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THE  
REPORTS  
OF

Sir Peyton Ventriss K<sup>t</sup>.  
Late one of the JUSTICES of the  
COMMON PLEAS.

In Two Parts.

Containing Select CASES Adjudged in the  
King's Bench, in the Reign of K. CHARLES II.

WITH

Three Learned ARGUMENTS, One in the King's Bench,  
by Sir Francis North, when Attorney-General; and Two in the Exche-  
quer, by Sir Matthew Hale, when Lord Chief Baron.  
With Two TABLES; One of the Cases, the other of the principal Matters.

The Second PART.

Containing Choice CASES adjudged in the Common  
Pleas, in the Reigns of K. CHARLES II. and K. JAMES II.  
and in the Three first Years of the Reign of their late Majesties  
K. WILLIAM and Q. MARY; while he was a JUDGE in  
the said Court: With the Pleadings to the same.

ALSO

Several CASES and PLEADINGS thereupon in the Exchequer-  
Chamber, upon Writs of ERROR from the King's Bench.  
Together with many remarkable and curious Cases in the Court of Chancery.

Whereunto are added

Three exact TABLES; one of the Cases, the other of the principal Matters,  
and the third of the Pleadings.

With the Allowance and Approbation of the Lord Keeper and all the Judges.

The Third Impression, carefully corrected, with an Addition of several Thousands  
of References, never before Printed; by M<sup>r</sup>. Serjeant Richardson.

In the SAVOY:

Printed by J. Nutt, Assignee of Edward Sayer Esq; for D. Browne in Exeter  
Exchange; G. Lloyd against the Temple Church; W. Mears, and J. Browne  
without Temple-Bar; C. Woodward, and C. Hook in Fleetstreet, 1716.



**W**E all knowing the Great Learning and Judgment of the Author, do (for the Benefit of the Publick) approve of and allow the Printing and Publishing of this Book, Intituled, *The Reports of Sir Peyton Ventris Kt. late one of the Justices of the Court of Common Pleas.*

*April the 20th,  
1695.*

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Ed. Nevill,

Joh. Powell,

W. Gregory,

N. Lechmere,

Tho. Rokeby,

G. Eyre,

Jo. Turton,

John Powell,

Sam. Eyre.

THE  
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THE EXCHEQUER, BY SIR MATTHEW HALE, WHEN LORD CHIEF  
JUDGE.

WITH TWO CASES TABLED; ONE OF THE CASES, THE OTHER OF THE  
PRINCIPAL MATTERS.

WITH THE DIFFERENCE AND APPROBATION OF THE LORDS JUSTICES  
AND ALL THE JUDGES.

THESE REPORTS, FIRSTLY CORRECTED, NOW ON A SECOND EDITION, ARE  
IN ADDITION, NEWLY REVISITED, BY THE SAME AUTHOR.

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TO THE  
**R E A D E R.**

**T**HE Name of the Reverend and Learned **JUDGE**, who was the Compiler of these *REPORTS*, will be a sufficient Invitation to the Understanding Reader, not only to cast his Eye upon, but seriously to peruse them.

And as my Lord *Coke* in his *Commentary upon Littleton* (fol. 249. b.) says, That for the most part the latter Resolutions and Judgments are the surest, and therefore best to season Students with at the beginning, both for the settling of their Judgments, and retaining of them in Memory, and easier to be understood than the ancient: So it is to be hoped that these following *REPORTS*, Collected with Care, Diligence and Experience, by the Learned Author thereof, will fully answer these Directions given by that before-mentioned famous Lawyer.



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*To the Reader.*

---

The Author of these **REPORTS** was so Eminent in his Profession of the **LAW S**, that should I presume to give a **Character** of him, it would come very short of His great Worth; and therefore I shall only commend him to the Courteous Reader, where he will find his own **Character** given by himself.

*Vale.*

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## ADVERTISEMENT.

Note, That the Author of these Reports has referr'd to Croke's Elizabeth as the first Part, and Croke's Charles as the third Part of those Reports, except in the first thirty Sheets of the first Volume, in which thirty Sheets he referr'd to Croke's Charles of the first Edition as the first Part, and Croke's Elizabeth as the third Part of those Reports.

*And note of the 1st volume of this book vide fo: 429.*

Term-



TERMINO  
Sancti Michaelis,

Anno 20 Car. II. in Banco Regis.

Sparks, &c. *versus* Martyn.

**J**ONES moved for a Prohibition to the Court of the Admiralty, for that they libelled against one for Rescuing of a Ship, and taking away the Sails of it, from one that was executing the Process of the Court against the said Ship, and for that in the presence of the Judge and face of the Court he assaulted and beat one, and spake many opprobrious Words against him. Now seeing that these Matters were determinable at Law, the Ship being infra corpus Comitatus, and they could not adjudge Damages to the Party, or fine or imprison him, he prayed a Prohibition.

But the Court denied it, (absentibus Wyndham & Moreton) 1 Cor. 216. For they may punish one that resists the Process of their Court, and may fine and imprison for a Contempt to their Court, acted in the face of it, tho' they are no Court of Record; but if they should proceed to give the Party Damages, they would grant a Prohibition quoad that: And of that Opinion was Wyndham, the Case being afterwards put to him by the Chief Justice. But the Parties afterwards put into their Suggestion, That the original Cause upon which the Process was grounded, was a Matter whereof the Court of Admiralty had no Cognisance: Wherefore a Prohibition was granted; For then the Rescous could be no Contempt.

Sir John How *versus* Woolley, an Attorney of the Court.

**I**t was moved, That Woolley should put in Special Bail, being an Attorney at large and having discontinued his Practice. But the Court said, Attorneys at large have the same Privilege with the Clerks of the Court; and are to appear de die in diem. And they were not satisfied that he had discontinued his Practice.

3

Suffil's

## Suffil's Case.

*Return of Salvois*  
*23<sup>rd</sup> Jo.*  
*Error*  
**I**T was moved to quash the Return of a Rescous against Suffil and divers others, who rescued a Person taken upon *Hefins* Process; because the Rescuers being particularly named *vis* said rescusserunt, and not *quibet eorum* rescussit. And for that a Case was cited in the 2 Cro. where the Sheriff returns an Exigent against divers, quod non comparuerunt upon the Quinto exacti, and doth not add nec aliquis eorum comparuit; and for that cause it was reversed in a Writ of Error, notwithstanding Twisden (he being only in Court) held it to be well enough, it being in the Affirmative.

## Anonymas.

*Prohibition ab*  
*Sub*  
**A** Prohibition was prayed to the Ecclesiastical Court, for that a Parson whelled against one there for calling of him Knave, and was granted, it not appearing to relate to any thing concerning his Function: And a Case was cited to be adjudged, 24 of the Queen, the Suit being in the Ecclesiastical Court for these Words, (viz.) Sir Priest, you are a Knave; and a Prohibition was granted.

*Prail*  
**Note**, If a Man be taken in Execution, he cannot be bailed, tho he brings a Writ of Error.

## Anonymus.

**I**N Debt upon a Lease for Years, the Defendant may plead Entry into part, upon which follows Suspension, and it doth not amount to the General Issue.

## Heely versus Ward.

*2 Keb. 437.*  
*Error.*  
**E**rror to reverse a Judgment given in the Court at Hall, where the Plaintiff in an Assumpsit did declare, That at such a Place, *infra* Jurisdictionem Curia, the Defendant in consideration that the Plaintiff had assumed to pay him so much a Year, promised to deliver him so many Yards of Kersey; and it was assigned for Error, That the delivery is not laid to be at a Place *infra* Jurisdictionem Curia; and indeed there is no Place at all. And of that Opinion was Twisden, (he being only in Court) and cited a Case, where in an Assumpsit in the Marshalsey, upon a Promise to make a Lease of a House in Middle Row, and after Judgment it was held erroneous, because Middle Row was not laid to be *infra* Jurisdictionem Curia.



The Bishop of *Lincoln versus Smith.*

**T**he Bishop of Lincoln sued in the Court holden before his Chancellor for a Pension, to which he intitled himself by Prescription, and a Prohibition was prayed for Smith the Defendant there; for that being by Prescription, that Court had no cognisance of it: And for that, my Lord Coke's Opinion was cited, 2 Inst. 491. especially he could not sue for it in his own Court. *prohibition* F.N.B. 51.B.

But it was resolved by Keyling and Twisden (the other Justices being absent) that Pensions, tho' they were by Prescription, might be sued for in that Court; for having cognisance of the Principal, that shall draw in the Accessary. As if one libel for a Modus decimandi, if they allow it, they may try it; and Coke's Opinion they said was not warranted by the Books, and Fitzh. N. B. 524. is against it, and the Court being held before the Chancellor, and not the Bishop himself, he might sue there: Vide Hob. 87. Conusans of Pleas granted to be holden before the Steward of the Grantee, licet the Grantee fuerit pars. *Cognisance* 1 Mod. 218. Postea 120, 265, 335. 2 Vent. 239. 2 Cro. 483.

Anonymus.

**A**n Attachment was prayed against one, who being arrested upon a Latitat, gave a Warrant of Attorney to confess a Judgment, and presently after snatched it out of his hand to whom it was delivered, and tore off the Seal: And the Court seemed to incline, in regard it was to confess a Judgment in this Court, that it was a Contempt, upon which an Attachment might be granted. *Attachment*

Anonymus.

**A** Prohibition was prayed, to stay a Suit in the Court-Christian for Tithes upon the suggestion of a Modus, which was alleged in this manner: That the Proprietors and Occupiers of such a Manor, or any Parcel thereof, should pay a Groat to the Parson for Herbage Tithes. *prohibition*

The Court held that this could not be, for if a Man had but two or three Foot of Ground in the Manor he should pay a Groat; but it ought to have been laid: That the Proprietors and Occupiers of such a Manor, for themselves and their Farmers, had paid Four Pence. Yelv. 2.

Twisleton *versus* Hobbs.

**A**ction for these Words, [You are a Forger of Bonds, a Publisher of Forgery, and sue upon forged Bonds.] Postea 18. *Hand*

The Jury found the Defendant Not Guilty, as to the first Words, and resolved the last Words were not actionable, it not being laid that he knew of the Forgery.



## Sir Thomas Griesly's Case.

Information

**I**nformation against him for stopping of the High-way, the word was Obstupabat. It was proved in Evidence, that he plowed it up; and resolved, it did well maintain the Information.

Anonymus.

*Nulla de Credulitate  
disponitur.*

**I**n Debt, If the Defendant wages his Law, the Oath of the Eleven which are sworn de credulitate, may be dispensed with by the Plaintiff's Assent. Vid. Mag. Charta, c. 28.

*Chap.*

Chief Justice Jones  
21.  
Postea 269.  
1 Sid. 330.

Note, It was adjudged in the King's Bench, 19 Car. II. That if a Prisoner escape by the Permission of the Sheriff, yet he may be retaken by the Party at whose Suit he was condemned; for it may be the Sheriff is insufficient; and it is not reason that his own Act should damnify the Plaintiff. Vide Hob. 202.

Termino Sancti Hillarii, Anno 20 & 21 Car. II.  
In Banco Regis.

Barnes versus Bruddel.

*Baron*

1 Sid. 396.  
1 Rolle 19,  
37.  
1 Lev. 261.  
2 Keb. 451.

**A**ction for these Words, alledged to be spoken of the Plaintiff, (viz.) She was with Child by J. S. whereof she miscarried; and concludes, That by reason thereof she was so brought into her Father's displeasure that he turned her out of doors, and that she was brought within the Penalty of the Statute of 18 Eliz. And in Maintenance of this Action a Case was cited out of Rolle's 1st Part 35, inter Meadows & Boyneham, an Action was brought for calling of one, Whore, Per quod consortium amisit Vicin' suorum; and held it would lie. And in Anne Davie's Case, 4 Co. 17. it is held, That since the Statute of the 18 Eliz. cap. 3. to say, One had a Bastard, would bear an Action.

But notwithstanding the Opinion of the Court was, That such an Action would not lie unless a special Damage had been alledged, as to say, She had lost her Marriage, as in Anne Davie's Case; and the Reason upon the Statute alledged in the Case, was said by Twisden to be of my Lord Coke's putting in; for Justice Jones affirmed to him, there was nothing said thereof in the Case.

Anonymus.

**I**f a Tradesman contracts Debts and gives over trading, he may be afterwards a Bankrupt within the Statute in respect of the Debts contracted before: And so it was said to be ruled in Sir Job Harvey's Case.

1 Sid. 411. *Bankrupt*  
Postea 29. Feb. 166.  
2 Keb. 453.

Anonymus.

**A** Warren may pay Tithes by Custom: So of Doves in a Dove-house, or Fish in a River.

*Tithes by Customs*

Note, It was said by Twisden, That if a Libel be in the Ecclesiastical Court for a thing whereof they have Cognisance, altho' the Party intitles himself to it by Custom, no Prohibition lies.

2 Keb. 452. *vid. not. for*

Anonymus.

**A** Prohibition was prayed, for that they cited him to answer unto Articles in the Ecclesiastical Court, and did not deliver a Copy of the Articles; and it was granted quousque they should deliver to him the Copy: But the Prohibition which was taken out was absolute, which the Court being informed of, they did not think fit to grant a Consultation, but to discharge that Prohibition by a Superseas. Whereupon they proceeded and excommunicated the Party for default of answering: Who again moved the Court for a Prohibition, and one was granted with a Mandamus in it, to absolve him, if it were for not answering before they gave him a Copy of the Articles.

Raym. 170. *prohibition*  
F.N.B. 43.E.  
1 Sid. 403.  
2 Keb. 352,  
404, 449.

*Mandamus to give a Copy*

Bains & Biggerisdale.

**E**rror to reverse a Judgment in an Action of Debt upon a Bond in Rippon-Court; because it was entred upon the Record, Affid' damna ultra misas & custagia ad 10 l. and doth not say, Occasione detentionis debiti, or Occasione prædicta; and the Judgment was, Quod recuperet damna prædicta, and doth not say, per Juratores assessa: Yet notwithstanding the Judgment was affirmed.

*Err.*

Billingham



Billingham &amp; Vavafor.

Error

2 Keb. 590.

**E**rror to reverse a Judgment in Debt, in the Court of York: assigned,variance between  
Count & PlaintiffVid. 3 Cro.  
619.

First, In the Variance between the Count and Plaintiff; for the Plaintiff was entred, Ad hanc Curiam venit & queritur de Placito deb' super demand' 14 l. and the Count was for 12 l. But it was answered, That the certainty of the Sum needed not to be expressed in the Plaintiff, and so Surplusage. But otherwise it is of a Variance between the Original and the Count; for the Writ must comprehend the certainty of the Debt; and 2 Cro. 311. was cited, where Debt was brought in the Common Bench for 40 s. and after the Return of the Pluries Capias the Entry was, Quod Querens obtulit se in pl'to deb' 40 l. and assigned for Error, and disallowed. But to that it was said, That that was but a Misprision in the Entry of a Continuance which had a former Record to warrant it: And here, tho' the certainty of the Sum need not to have been expressed; yet when it is, the Plaintiff must not vary from it. Et adjornatur.

Bourne versus Mason. &amp; al'.

2 Keb. 454,  
457, 527.

Arrest of Judgment

Postea 318,  
332.

**I**n an Assumpsit, the Plaintiff declares, That whereas one Parrie was indebted to the Plaintiff and Defendants in two several Sums of Money, and that a Stranger was indebted in another Sum to Parrie; that there being a Communication between them, the Defendants in Consideration that Parrie would permit them to sue in his Name the Stranger for the Sum due to him, they promised they would pay the Sum which Parrie owed to the Plaintiff; and alledged, that Parrie permitted them to sue, and that they recovered. After Non Assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff could not bring this Action, for he was a Stranger to the Consideration.

Special Assumpsit

Vide. 3 Cro.  
619.  
1 Rolle 31.  
N. 6.  
2 Sid. 115.

Raym. 302.

But in maintenance thereof a Judgment was cited in 1658. between Sprat and Agar, in the King's Bench, where one promised to the Father, in Consideration that he would give his Daughter in Marriage with his Son, he would settle so much Land. After the Marriage the Son brought the Action; and it was adjudged maintainable. And another Case was cited of a Promise to a Physician, That if he did such a Cure, he would give such a Sum of Money to himself, and another to his Daughter; and it was resolved, the Daughter might bring an Assumpsit. Which Cases the Court agreed: For in the one Case the Parties that brought the Assumpsit did the meritorious Act, tho' the Promise was



was made to another; and in the other Case, the nearness of the Relation gives the Daughter the benefit of the Consideration performed by her Father; but here the Plaintiff did nothing of trouble to himself, or benefit to the Defendant, but is a mere Stranger to the Consideration; wherefore it was adjudged Quod nil capiat per billam.

*Herbert versus Merit.*

**A** Prohibition was prayed to the Ecclesiastical Court, for that the Defendant libelled against the Plaintiff there, for calling of her, Impudent Whore, which was said to be only a word of Passion; and the later Opinions have been, that unless some Act of Fornication were expressed that Prohibitions should be granted.

But the Court denied it in this Case, it being an Offence of a Spiritual Cognisance, and Eaton and Ailoff's Case, 1 Cro. 110. and Pewe's Case, 339. were cited.

The Sheriff may sell Goods which he takes in Execution by a Fieri Facias, at any Rates, if the Defendant denies to pay the Money.

Nota, No Action of Debt lies against the Sheriff when the Party escapes who is taken upon a Mesne Process, but an Action upon the Case only.

*Vaughan & Lloyd.*

**I**n an Audita Querela, the Party appeared upon the Scire Facias, and demurred, for that the Scire Facias bore date the 23d Day of October, and the Audita Querela the 3d of November after. To which it was said, that this Fault in the Mesne Process is aided by Appearance; but if an Original should bear Date upon a Sunday or the like, the Appearance of the Party would not help it. But on the other side it was said, That the Party had no Day in Court by the Audita Querela, and this was a Default in the first Process against him, and compared it to a Scire Facias upon a Judgment, in which such a Fault will not be cured by Appearance. To which the Court agreed. For there the Scire Facias is the Foundation, and quasi an Original, and the Judgment is given upon it; but here the Scire Facias is only to bring in the Party to answer, and in the nature of a Mesne Process, and the Judgment is given upon the Audita Querela; wherefore they disallowed the Demurrer.

*Assumpsit can't be assigned by stranger to go out not good*

*prohibition*  
1 Sid. 404.  
2 Keb. 453.  
454.

Postea 61,  
220, 343.  
1 Mod. Rep.

21.  
3 Cro. 110. 397. *single & double*  
*good action by*  
*file: has they may & so*

*Relies & Thayer.*

*Audita Querela*  
1 Sid. 406.  
2 Keb. 461.  
*if a person is in possession of a person's property and that an original is given to a judge.*

2 Cro. 424.

Barnes *versus* Hughes.

1 Lev. 249.  
1 Sid. 400.  
Curtis & In-  
man.  
Postea 364.  
Lit. Rep. 163.  
3 Lev. 71.  
2 Keb. 401,  
424, 447,  
458.

*Arrest of Judgment*

*ind. B. R. 37.*

Cro. Car.  
146.

**D**eht tam pro Domino Rege quam pro seipso, upon the Stat. of 5 Eliz. cap. 4. for exercising of the Trade of a Grocer in Salisbury, not being bound Apprentice thereunto. The Defendant pleads Nil debet, and being tried by Nisi Prius, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Action could not be brought in this Court, for by the Stat. 21 Jac. cap. 4. It is enacted, That all Offences against any penal Statute, for which an Informer may lawfully ground any popular Action, Bill, Complaint, Suit or Information before Justices of Assize, Nisi Prius or Gaol-delivery, Justices of Oyer and Terminer, or of the Peace in their General Quarter-Sessions, shall be commenced, sued, &c. before the said Justices, they having Power to hear and determine the same; and not elsewhere; which Negative words, as it was said, take away the Jurisdiction of this Court: And whereas 31 Eliz. restrained not the King's Attorney because it only made mention of Common Informers; the King's Attorney is expressly named in this Statute, and the Cases in 2 Cro. 85. between Beane and Druge, and Moyl and Taylour's Case, 2 Cro. 178. were quoted. And the Statute would be to little purpose, if it did not extend to Actions of Debt, as well as Informations and Indictments. But it was said on the other side, That it could not extend to Actions of Debt, for they could not be brought before Justices of Assize, or the other Justices named in the Act, and it shall only extend to such Suits as an Informer might lawfully commence before them. And it has been resolved, That this Act did give no new Jurisdiction, as 1 Cro. 112. Farrington and Keymer's Case, in an Information upon the Statute of 23 H. 8. cap. 4. for selling of Beer at an unlawful Price, which gives the Forfeiture to be recovered in Courts, where no Protection or Wager of Law shall be allowed in any Suit grounded upon it, extends only to the Courts at Westminster, as 6 Co. in Gregory's Case it was resolved, That no Information for an Offence against this Statute could be commenced before the Justices of Assize or Peace at the Sessions, notwithstanding the Act in 21 Jac. which ordains, That Suits for offences against Penal Laws shall be before them and the rest there mentioned; For the Act only extends to those Offences, for the which an Informer might lawfully ground any popular Action before them, and it was never held, that that Act gave any new Jurisdiction. Now if this Action cannot be brought in this Court, the Statute must repeal a great part of the Remedies given by 5 Eliz. against this Offence, and only leave it to be punished by Indictments and Informations, which certainly was never the intent of the Statute, and would be very mischievous; for if the Offender goes out of the County



after the offence committed, he cannot be punished; for the Justices named in the Statute cannot award Process out of the County, and therefore for that reason there should be remedy in a Court of General Jurisdiction, and since 21 Jac. there have been many Precedents of like Actions; all which would be reversed, if that Act should take away Actions of Debt in this Court. And for these Reasons the Case being moved divers times, the Court gave Judgment for the Plaintiff. Styl. 340.

## Anonymus.

**I**n Debt upon an Obligation the Defendant pleads, That he delivered it as an Escrow, & hoc paratus est verificare. This Plea is vicious, for he ought to shew to whom he delivered it; and also he ought to conclude his Plea, & iussit nient son fait. Plo. Com. 66. 2 Cro. 85.

## Anonymus.

**A** Lease for Years is made to A. and then another Lease is made for twenty Years, to commence after the Expiration of the former Lease, if B. and C. should so long live, with a reservation of several things, and Reddend 3 l. nomine Herioti after the death of B. or C. B. dies during the continuance of the first Lease. The 3 l. must be paid; for it is not in the nature of a Rent, but a Sum in gross. Postea 91. 2 Saund. 165. 1 Sid. 437.

## Clipsam and Morris.

**T**he Plaintiff in an Assumpsit declared, That J. S. being indebted unto him in 50 l. gave him a Note, directed to the Defendant, requiring him to pay the Plaintiff the said Sum of 50 l. Then he saith, that the Defendant upon view of the Note, in consideration that the Plaintiff would accept of his Promise for the Money, and stay a Fortnight for the same, he did assume to pay him. 1 Lev. 248. 1 Sid. 369. Postea 154. 2 Keb. 401. 443, 453.

To which the Defendant demurs for the insufficiency of the Consideration; it being nothing of trouble or prejudice to the Plaintiff, or benefit to the Defendant, for he might sue his Debtor in the mean time; neither is it alleged, that the Defendant was indebted to J. S. But if it had been in consideration, that the Plaintiff would accept of the Defendant for his Debtor, that might have been good; for that is an implied Discharge of the other, whom if he had sued, the Defendant might have had an Action. 1 Roll 29. And for this Reason the Opinion of the Court was against the Plaintiff. And this Point was said to be adjudged between Newcomen and Lee in this Court, Paschæ 1650. Rot. 62. Styl. 249. 1 Mod. 12: Hardr. 71. Winch 7. 1 Saund. 210. 1 Sid. 396.

C

Anony-



## Anonymus.

*Indictm. quod*  
Postea 16.  
2 Keb. 249.

A Man was indicted for saying, The Justices of the Peace had nothing to do with the Excise: And it was quashed by the Opinion of the Court: for such an Information could not make a man criminal.

## Nurste versus Hall.

*Covenant, if*  
*Assignee of the*  
*Bankrupt, and*

1 Saun, 230,  
C. 237.  
3 Mod. Rep.  
336, 337.  
338.  
1 Sid. 401.  
3 Lev. 394.  
2 Keb. 439,  
448, 468,  
492.

THE Grantee of a Reversion brings an Action of Covenant against the Lessee for years, for non-payment of Rent. The Question was, Whether it ought to be laid where the Lease is alledged to be made; or, where the Land lies? It was said, That the Statute of 32 H. 8. c. 34. which gives the Action of Covenant to the Assignee of the Reversion, saith, That they shall have such Actions in like manner as the Lessors should have had. Now if it had been brought by the Lessor, it had been transitory, and so in the Case of an Assignment by Commissioners of Bankrupt, the Assignee of the Commissioners of Bankrupt shall bring Debt as the first Creditor should have done.

But it was said on the other Side, That the Statute intended not to assign it as a bare Chose en Action, but to knit it to the Reversion; and where it saith, The Assignee shall have Remedy in like manner; that is, the same Remedy in substance: And in the case of the Bankrupt's Debt the Contract is only assigned. And in the 42 E. 3. cap. 3. it is said, That an Action of Covenant lay for the Assignee at the Common Law. But because the Court was not full, it was thought fit this Case should be Adjourned till the next Term.

1 Roll. 519.  
No. 10.

Note, It was said in this Case, the Word Reddendum makes a Covenant.

## Day and Pitts.

*Prohibition*  
2 Keb. 471.

A Prohibition was moved for to stay a Suit in the Spiritual Court, upon a Suggestion, that it was for calling one Old Thief, and Old Whore; and if there were any such Words spoken, they were spoken at the same time: which Suggestion was not good; for the Words ought to have been fully confels'd. And it was said by the Court, That this Matter ought to have been pleaded there, and if they had not admitted the Plea, then to move for a Prohibition, and not before.

Gilman

Gilman and Wright.

Burgh moved against Wright (Steward of Havering Court in Essex) for refusing to admit Gilman an Attorney in this Court to appear for a man in an Action sued against him there; alledging, That the Attorneys of the Courts of Westminster might practise in any inferior Court; neither had they a Prescription or Charter to have a certain number of Attorneys of their own, and to exclude others.

But because it was the general Usage of those inferior Courts to admit none but their own Attorneys, tho' the Court seemed to incline, That they ought not by Law to refuse others; and it was said to be so adjudged in the 15th of Car. 1. in one Darcie's Case; yet they would be advised until the next Term.

Note, One who is Subpena'd for a Witness, may have a Writ of Privilege to protect him from Arrests in going and returning.

Anonymus.

A Prohibition was granted to the Court of the Marches of Wales for that Lands being descended to an Infant, which was subject to a Trust, they had not only enjoined the possession of those Lands, but of other Lands descended to him. And it was said by the Court, That they could not sequester Lands at all, for the performance of a Decree of their Court to pay Money. For they can only agere in personam, & non in rem.



Termino Paschæ, Anno 21 Car. II.

In Banco Regis.

Anonymus.

*Self ret. Sheriff*  
Postea 24. **T**he Sheriff returned Non est inventus to a Writ brought against his own Bailiff, and delivered to him. But the Court amerced him Forty shillings, and he was ordered to amend his Return.

Anonymus.

*Non placuit coram  
ag'ta p'mo coram  
Baron ad hoc*  
2 Keb. 476.  
V. Yel. 166.  
Cr. Car. 254.  
Postea 24, 33.  
1 Roll. 6.  
Noy 6, 7.  
Postea 18. **T** Rober and Conversion was brought against Baron and Feme, for that they ad usum proprium converterunt & disposuerunt; and held not to be good, because the Wife cannot convert with her husband.

Skinner and Gunter, &c.

*Bill ad rem.  
to take in nature  
of Conspiracy*  
2 Cro. 667.  
Hob. 205,  
266.  
Postea 18,  
23, 25, 362.  
1 Saun. 228.  
Raym. 176.  
2 Keb. 473,  
476, 497. **A** Bill in the nature of Conspiracy was brought against Three, for that they, Conspiracione inter eos habita, caused the Plaintiff to be arrested in London, on purpose to vex him and have him imprisoned, knowing that he was not able to find Bail, whereas they had no cause of Action. The Defendants pleaded Not Guilty, and the Issue was found only against one of them.

*Arrest Judgment.*  
It was moved in Arrest of Judgment, That the Declaration was insufficient, because it was not declared that the first Action was determined; For no Conspiracy lies upon an Indictment before Acquittal.

*non all*  
But the Court inclined to disallow this; for here the ground of the Action is the causeless troubling of him to put in Bail: But when a man is indicted, he lies under the scandal of the Crime until he is acquitted.

*lib*  
Raym. 118,  
176.  
Postea 234. Another Exception was, That this Bill being in the nature of a Writ of Conspiracy, there being One only found Guilty, the Action fails. But it was said, True, it is so in case of Conspiracy to indict one of Felony; but here 'tis rather in the nature of an Action upon the Case, and the Conspiracy alledged is by way of Aggravation. Fitz. N. B. 116. Et adjournatur. Postea 18.

Anonymus.

## Anonymus.

**A** N Indiament was removed hither the last Term out of 2 Keb. 476. 1 Middlesex, against Edward S. of Perjury, and he was named Edward all along in the Indiament unto the Conclusion, and then it was, & sic prædictus Johannes commisit perjurium. The Court was moved that this might be amended, and it was said, Indiaments removed out of London have been amended by the Original, for they do not certify that, but only a Transcript; and a Jury have been resummoned to amend an Indiament found in this Court; and in this Case, if by Examination of the Clerk of the Peace it appeared, that the Indiament certified varied from the Original, it might be amended; sed Curia advisare vult.

Nota, If a Venire Facias be returned and not filed, a new one may be taken out.

## Thomas Burgen's Case.

**A** N Indiament was brought against Thomas Burgen, for selling Ale in black Pots not marked, and doth not conclude contra formam Statuti, and held to be good enough, for the Common-Law appoints just Measures; and tho' the Statute adds this circumstance, yet the Crime being at Common Law, the Conclusion is as it ought to be.

Where a Statute makes an offence more penal, (as that which deprives one that steals the value of five Shillings, out of a dwelling House in the Day time, of his Clergy,) yet the Conclusion of an Indiament in that case is not contra formam Statuti.

Nota, Where one is sued by a name with an Alias, the Addition must be expressed after the first Name.

## Clerke and Cheney.

**I** N Trespass for breaking of his Close, the Defendant justifies by reason of a way from his House thorough the place where, usque ad eam viam regiam in parochia de D. vocat. London Road, and Issue was joined upon the Way, and found for the Plaintiff: It was moved in Arrest of Judgment, that there was no Issue joined, for the uncertainty of the Terminus ad quem, whether this Way should lead; and one that justifies for a Way, if he alleges the place from whence, and to which, and that it leads over the place where, 'tis sufficient, tho' he mistake the other mean passages

2 Keb. 476. 1

*Indiament amended*

1. Inst. 47.

1 Sid. 409.

2 Keb. 477.

*Indiament for selling ale good**it doth not conclude*

1. Inst. 370.

1. Inst. 17.

Cr. Eliz.

198, 249,

583.

2 Inst. 669.

2 Leon. 183.

Dy. 50.

2 Keb. 480,

488.

Hob. 189.

*Trespass for a way*



ges of it, and tho' this be the Defendant's own Plea, yet he may take Exceptions to it, not being certain enough to make an Issue.

Sed non allocatur, for in regard it is found that he had a Way over the place where, it is not material to the justification whether it leads, it being after a Verdict, when the right of the Case is tried: And it is aided at last by the Statute of Oxford, 16 Car. And so Twisden said, it was the Opinion of all the Judges at Serjeants-Inn, he putting the Case to them at Dinner.

Norris and Cuffail.

2 Keb. 479,  
513.

*Inimus ad quod sol  
material, off a verdict, if a  
way be proved over the place  
where.*

*Dismissed, solved off  
a verdict.*

*Pa*

**I**N an Action upon the Case the Plaintiff declared, That the Defendant in consideration of six Pence paid in hand the 13th of Jan. 17 Car. and that the Plaintiff would pay him 20 s. a Month, he promised to serve him in his Glass-house after the first Journey of Glass; and sets forth, quod primum iter vitrii tunc prox. sequens aggregamentum prædictum fuit 21 Feb. 17 Car. which was the Year before, and that the Defendant did not come to serve him.

After Verdict for the Plaintiff it was moved in Arrest of Judgment, That the Plaintiff had not declared sufficiently of any Journey of Glass after the Agreement, but that alledged, appears to be the year before. Et adjournatur: This Case being moved again, Twisden said he had put it to the Judges at Serjeants-Inn, and they were all of Opinion that it was well enough after a Verdict.

Heath *versus* Pryn.

*Ex: Sol  
Rectory -*

1 Sid. 426.  
Clark *versus*  
Pryn.  
1 Mod. 11.  
2 Keb. 484,  
556.

**I**N an Ejectione Firmæ of the Rectory of Westbourn in Chichester, upon Not Guilty pleaded, it appeared upon the Evidence that the Plaintiff's Title was as Presentee of the Grantee of the next Avoidance from the Lord Lumley, and Letters of Institution under the Seal of the Ordinary were produced; but by reason of the Times (the Ordinary, Parson and Patron being sequestred,) no Induction followed thereupon, until the King's Restoration; this Institution was 1645. Soon after the Defendant was placed in this Church by an Ordinance of Parliament, and hath enjoyed it ever since; and there was an Act of Parliament made, 12 Car. 2. which confirms Ministers in their Possessions of any Benefice with Cure, tho' they came not in by Admission, Institution and Induction, but according to a Form used in those times, in which Act there is also a Clause of Restitution of sequestred Ministers, to such Benefices as they had been seized of by taking the profits.

It was alledged on the Defendant's side, That the Plaintiff proving nothing of a Presentation, the Institution could not be admitted as an Evidence of it, especially in this case, where the Induction was so long after; to which the Court did incline. And then the Oath of the Grantee of the next Avoidance was offered, which was not admitted, altho' his Interest was executed by the Presentation. And it was said, That an Assignor might be sworn a Witness to the Assignment of a Lease, where there were no Covenants. It was also said, That the Plaintiff was not within the clause of Restitution, of the Act of 12 Car. because he was never seized by taking the Profits, which cannot be until Induction, according to Hare and Bickler's Case, in the Commentaries, quod fuit concessum.

To which it was replied, That neither was the Defendant within the Clause of Confirmation, because the Rectory in question was not a Benefice with cure, for there is belonging to it a perpetual Vicaridge endowed, and the Vicar comes in by Admission, Institution and Induction, who performs Divine Service, pays the Synodals and Procurations, repairs the Chancel; and therefore it hath been adjudged, that such a Vicar shall have Arbores in Coemiterio: and it was said that the Statute of 21 H. 8. against Pluralities, doth not extend to Rectories, where there are Vicaridges endowed. And Linwood describes a Benefice without cure, *cujus cura Vicariis perpetuo exercenda est*: Otherwise where the Vicar is temporal and removeable. And the difference is inter curam actualem & habitualem. And 'tis the Cure that the Rectory hath, and so hath every Bishop in his Diocese; who when he gives Institution saith, *Accipe curam tuam & meam*; but the Act only extends to the first.

It appeared also on the other side, That the Parson had come once or twice a year, and preached and administered Sacraments; and that without the Vicar's leave, and also paid First-fruits: Upon all this matter the Opinion of the Court was, That the Parson had a concurrent Cure with the Vicar, and resembled it to the case where there are two Incumbents in one Church, and coming in by Admission, Institution and Induction, the Vicar could not discharge him of the Cure of Souls. But Donatives, which are conferred by Laymen, are sine cura.

Note, The Plaintiff's Counsel would have denied the Act of 12 Car. to be an Act of Parliament, because they were not summoned by the King's Writ; but the Judges would not admit it to be questioned, and said, That all the Judges resolved, that the Act being made by King, Lords, and Commons, they ought not now to pry into any defects of the Circumstance of calling them together; neither would they suffer a point to be stirred, where-

*Defendant not proved  
Institution could be admitted*

*Grantor of a lease of  
assignor to an assignee  
may witness assignment of  
lease w. no covenants  
Institution not admitted to  
profits of parson*

*Benefice w. Cure*

*Arbores in Coemiterio  
who may have y<sup>e</sup>*

*Benefice w. out Cure*

*Parson & Vicar having  
a concurrent Cure*

*Donatives, sine cura*

*Authority of Stat: 12. Car.  
not supposed to be questioned  
why*



Hob. 109.  
33 H. 6. 19.

in the Estates of so many were concerned. Notwithstanding all this, the Jury found for the Plaintiff. It seemed by the Court in this case, that Letters of Institution must be under the Episcopal Seal; sed vide Cro. lib. 1. 249.

*Institution the Bishop's Seal.*

### The King against Burford.

Ante 10.  
2 Keb. 494.

*Words concerning Justice of Peace & Monarch's power and jurisdiction.*

**H**E was indicted, for that he scandalose & contemptuose propalavit & publicavit verba sequentia, viz. That none of the Justices of Peace do understand the Statutes for the Excise, unless Mr. A. B. and he understands but little of them, no, nor many Parliament-men do not understand them upon the reading of them. And it was moved to quash the Indictment, for that a man could not be indicted for speaking of such words; and of that Opinion was the Court: But they said he might have been bound to his Good Behaviour.

### Stone's Case.

*Privileges of Attorneys from public & private service.*

Postea 29.  
Raym. 179.  
1 Lev. 265.  
2 Keb. 477,  
486, 491,  
508.  
Après 29.

1 Cro. 422.

March 30.

Cr. Car. 389.

**A** Writ of Privilege was prayed for Stone, an Attorney of the Court, who was a Coppyholder of a Manor, where the Custom was, for the Homage to chuse one of the Tenants to collect the Lord's Rents for the year following; and they elected him. But it was said, that this might be taken to be parcel of his Tenure, for the Lords use to seize the Land for not executing of it; and his Privilege ought not to deprive the Lord of the Service of his Tenant. In the Book of H. 6. the Archbishop of York being bound by Tenure to collect the Cents, pleaded the King's Letters Patents in discharge thereof, and they were disallowed; and the Attorneys have had their privilege where they have been pressed for Soldiers, as in Venable's Case, 1 Cro. 8 Co. Entries, 436. Spring's Case, and 1 Cro. 283. and where by Custom it came to an Attorney's turn to be Constable, vid. Roll 2. part. 276. yet these are publick Services to which every one is bound; but Privileges may be allowed to exempt particular persons, as the King may grant to one, that he shall not be of a Jury.

But the Court inclined to grant the Writ; for it did not appear that it was parcel of his Tenure, but rather imposed upon him by the Custom of the Manor; and if Attorneys shall be discharged of the Service of the Common-wealth, a fortiori of any private Service. Vide postea 29.

The King *versus* Webb.

**I**N an Action brought against him for imbeziling of the King's Goods, which was laid in the Declaration to be in London; it was moved for the King, that the County might be changed: And the Court held the King might choose his County, and might waive that which he had seemed to have elected before, as he may waive his Demurrer and join Issue, & contra. *In Court*

1 Sid. 412  
2 Keb. 386

*bohus changed  
prayer of Demurrer  
King to join Issue -*

## Perry's Case.

**I**N an Information of Forgery against him, being an Attorney of the Common-Pleas, it was alledged, That he had framed a certain Writing in the form of a Release at Sherborn, and that he published and gave it in Evidence at Dorchester, and the Venue came out of Dorchester; whereas it was said, it ought to have come out of both places. To which it was answered, That the publishing, and not the framing, was the Crime, But notwithstanding it was held to be a Mis-trial, and being in an Information it was not aided by any Statute. Postea 35.

Postea 35.

2 Keb. 490.

501, 527.

*Stat. de falsis*

*et per non ad*

*aug. defect in Infor-*

*mation at Dorchester*

*vid. fo 35.*

## Anonymus.

**I**N Trover and Conversion, amongst other things the Plaintiff declared de sex bovis, instead of bobus. Upon Not Guilty pleaded, and found for the Plaintiff, and entire Damages assessed.

It was moved in Arrest of Judgment, That the Jury ought to have given no Damages; for bovis, being a word insensible, and entire Damages being given, it was naught for all. To which it was answered; That if the Word be insensible, notwithstanding the Anglice, the Jury shall not be intended to have regarded it in the giving of Damages; and if it hath a Signification, then it is well enough. And it was said, Bovibus was an old Latin Word, and is found in Plautus, and 'tis bobus only by contraction. It was also said, That the Plaintiff brought this Action as Executor, and the Trover was laid in the Testator's time, which was not sufficient, tho' the Conversion was alledged in his own.

*Magist. not arrested  
upon exception of false  
Latin.*

Postea 30, &

31.

But the Court held neither of these Exceptions sufficient to arrest Judgment.



Rumsey *versus* Rawson.

Postea 25.

Raym. 171,  
2 Keb. 410,  
493, 504

**I**N Replevin, the Defendant avowed for Damage Feasant.

The Plaintiff replies, That the Parson of such a Parish and all his Predecessors have had time out of mind Common in the place where, &c. belonging to his Glebe, and that the Beasts of the Plaintiff were Levant and Couchant upon the Glebe, and he put them into the Common by the Licence of the Parson.

The Defendant traverses that they were Levant and Couchant, and found for the Plaintiff. And it was moved in Arrest of Judgment,

That the Plaintiff had not alledged matter sufficient to justify his Beasts going in the Common; for no other Beasts ought to be put into the Common, but those of the Tenant of the Land to which it is appendant, or those which he takes to Compester his Land. Fitz. N. B. 180. b. and that tho' the Common be claimed for a certain number.

And the Opinion of the Court was, That the Defendant might have demurred in this case. But after a Verdict the Court shall intend they were Beasts which the Parson procured to Compester his Land, and the Right of the Case is tried, so aided by the Statute of Oxford. But they gave farther time to shew Cause. Postea 25.

## Anonymus.

*Scandal - with  
Partner in felony  
Actionable.*

1 Sid. 413.  
Ante 3.  
1 Roll. 67.  
N. 27, 68.  
N. 29.  
2 Keb. 494.

**A**N Action was brought for these words, [Thou hast received stolen Goods, and knew they were stolen. Alice S. stole them, and thou wert Partner with her] For the first words the Court held them not actionable; for they might admit of a justifiable Construction, as if the Goods were waived. But the last were holden sufficient; for Partner with her must intend Partner in the felony.

Skinner *versus* Gunter & al.

*Conspiracy bid*

Ante 12.  
Postea 23,  
25.

**T**HE Case was moved again by Pemberton, and alledged in maintenance of the Action, That it was but in the nature of an Action upon the Case; for at the Common-Law no Writ of Conspiracy lay but for indicting one of a capital Crime; and that after an Acquittal by Verdict. But since the Statute of 33 Ed. 1. de Conspiratoribus, Actions have been brought for conspiring to indict one of Trespass, or to sue one maliciously without cause of Action, as this Case is, and so is Br. tit. Consp. pl. 2. and by F. N. B. 116.

such

such an Action in the nature of Conspiracy lies against one. And <sup>Postea 234</sup> the Title of the Action in this Case is In placito transgr. super casum; and for these Reasons all the Court were of Opinion for the Plaintiff. Vid. ante 12.

## Braithwaite's Case.

**B**raithwaite brought a Mandamus to the Mayor, Bailiffs and <sup>2 Keb. 488.</sup> Burgesses of the Town of Northampton, to be restored to his <sup>Mandamus, to restore an Alderman.</sup> Place of Alderman there.

They make a Return, and in their Return set forth the Letters Patents of 16 Car. by which they were incorporated; and Power is given them of holding a Common-Council, consisting of a Mayor, 2 Bailiffs and 48 Burgesses, and that the Mayor, Bailiffs, and such Burgesses as had been Mayors (commonly called Aldermen) should have Power upon just Cause to amove any Common-Council-Man from his Place there; and then they set forth how Braithwaite was a Member of the Common-Council, and had committed divers Offences, which they expressed in particular. Whereupon, the 18th of Dec. 17 Car. the Common-Council assembled together, & summoniri procuraverunt the said Braithwaite; and he not coming to answer, was the same Day amoved ab officio suo & loco suo in Communi Concilio per Majorem & Burgesses autoritate & secundum Chartam prædictam.

It was also set forth, That they had a Command from the King and Council to amove him. Upon this Return there were four Exceptions taken.

First, That it did not appear that he was summoned; for it ought to have been, qui quidem Braithwaite postea summonitus fuit, and not summoniri procuraverunt. Sed non allocatur; for it was held clearly to be all one. Otherwise, if it had been quod procuraverunt J. S. eum summonire.

A Second Exception was, That their Proceedings were too quick; for they amoved him the same day wherein he was summoned. Sed non allocatur; for it appearing he lived in the same Town, and refused to come to make his Defence, they might immediately amove him.

A Third Exception was, That they had exceeded their Power, which was only to amove him from his Place in the Common-Council, and they had amoved him from his Office. Sed non allocatur; for 'tis that wherein his Office consists, and indeed it was so averred in the Return.

But the main Exception was, For that they had not (as was alledged) pursued their Authority; for the Mayor, and such Burgesses who had been Mayors, have Power given them to amove. And here the Motion is said to be per Majorem & Burgesses, so that it



might be by the Mayor and Burgeses which never had been Mayors; and if in regard it was indefinite, it should be intended, that all the Burgeses were there, and it may be the Motion was by the Vote of such Burgeses as have not been Mayors, they being the greater Number, and the others might dissent; as if the Mayor and Court of Aldermen in London were impowered to do a thing, and this is done per Cives Londini, it cannot be good. Sed non allocatur. For

First, it shall be intended, That all the Burgeses were there, and that they all agreed in the Amoving of Braithwaite. And if the Truth were, that the Burgeses which were qualified, dissented, which must not be presumed, they might bring an Action upon the Case for the false Return: And further, to enforce the Intendment as before, it is said to be per Majorem & Burgeses secundum Chartam: If it had been returned, that he was amoved secundum Chartam generally, that had not been good, for there must be the manner returned, That the Court may adjudge whether the Authority be pursued.

It was further declared by Keyling, Rainsford and Moreton, That the King and Council might disfranchise any Member of a Corporation. And it was said by Rainsford, That the Walls of Northampton were ordered to be pulled down by the King and Council; a fortiori an Alderman might be displaced upon just Cause; and here was no Exception to the Causes returned. But to this Twisden said nothing.

Merchant contra Driver Administrator Rowe.

5 Co. 32.  
1 Saun. 303.  
Postea 221.  
1 Sid. 412.  
2 Keb. 488.

For: charged de bonis propriis  
whereof Twisden was only  
alongavit, not devastavit;

UPON a Fieri facias to levy a Debt recovered against an Executor, the Sheriff returned nulla bona; whereupon, after a Testatum, &c. a Writ was awarded to the Sheriff to enquire, &c. who returned, That Goods to the value of the Debt came to the Executor's hands, & elongavit, vendidit, disposuit & ad proprium usum suum convertit. And Issue was taken by the Party, who came in upon a Scire facias, quod non elongavit, &c. and the Jury found for the Plaintiff. And it was moved by Saunders in Arrest of Judgment,

That there was no proper Issue, neither did it appear that there was any Devastavit; for the Executor may eloigne and sell the Goods; therefore the Return and Issue ought to have been quod Devastavit.

Sed non allocatur; for this tantamounts; and the Precedents are so; as 'tis a good Warrant for a Capias in Withernam, when the Sheriff returns, that the Defendant in Replevin hath eloigned the Beasts; so the Executor ought to be charged de bonis propriis upon his Return.

Wharton

Wharton and Brook.

**I**N an Action for Words, the Plaintiff declared, That she was and had been a long time a Midwife, and got divers Gains; and that the Defendant, to scandalize her in her Profession, said of her, She is an Ignorant Woman, and of small Practice, and very unfortunate in her way: There are few that she goes to, but lie desperately ill, or die under her hands.

The Court held the Action maintainable.

But Twisden said, This hath been adjudged, where one brought an Action, declaring she was a School-mistress, and taught Children to Write and Read, by which she got her Livelihood; and that the Defendant said of her, She was a Whore, and that J. S. kept her as his Whore: That to slander one in such a Profession was not maintainable without special Damage.

Sir Thomas Player (Chamberlain of London) and Jones.

**R**ESOLVED by the Judges, That the By-Law in London, whereby the Number of Carts were restrained, was a good By-Law.

Walter and Chauner.

**I**N Trespass the Defendant justifies for Damage feasant. The Plaintiff in his Replication prescribes for Common, in the place where, &c. in this manner:

Until the Field was sown with Corn; and after it was sown & post Blada illa messa, until it was sown again. To which the Defendant demurs.

And it was said, That this Prescription was unreasonable, viz. To have Common in Land sown. To which it was answered and resolved by the Court, That as the Prescription was laid, the Common was not claimed until after the Corn was reaped.

Nota, Upon a Fieri facias the Sheriff returned, That he had taken Goods, and that they were rescued from him by certain Persons: And it was held to be no Return, and that he was to be amerced.

Anonymus.

**O**NE recovers Debt, and then brings a new Action of Debt upon the Judgment: The Defendant pleads a Tender of the Money before the Action brought, & uncore prist, and the Plaintiff could have no Costs.

If

Cr. Car. 211.  
2 Keb. 489. *Slander of one in profession may maintain Action*

1 Sid. 284. *By-law as to No. of carts in Lond. held good.*  
2 Keb. 27, 501, 873.  
Postea 196.  
Raym. 288, 324.

1 Rol. Abr. 364. N. 5. *Prescription.*  
2 Keb. 491.

Miller and Ward.  
Postea 92.

Postea 52. *Rescous a vol. thing not good upon a fieri facias.*  
2 Rol. 459. N. 2.

*No Costs after a tender before Action brought upon a judgment.*



*Abatement  
differently of the  
in the Court  
his to the writ, or  
the writ in the  
writ.*

25 Co. 111 a.  
Allen 65.  
Yelv. 112.  
Raym. 118.  
1 Sid. 252.

If the Defendant plead in Abatement of the Writ, and the Plaintiff demurs, and 'tis adjudged against the Defendant, it shall be only quod respondeat ulterius.

But if he alledge any thing in Abatement whereupon Issue is joined, and tried and found against the Defendant, there the Plaintiff shall have his Judgment to recover his Debt.

Skier and Atkinson.

*Costs of the  
in an Action of  
the writ of Habeas  
Corpus.*

2 Inst. 288,  
289.  
1 Co. 116.  
a. b.  
2 Keb. 496,  
499, 503,  
528.  
3 Cro. 583.  
1 Leon. 382.  
2 Leon. 52.

**I**n an Action upon the Statute of 8 H. 6. of Forcible Entry, the Secondary craved the direction of the Court before he could pay Costs; and they were doubtful in it, and rather inclined, that the Plaintiff was to have no Costs: But upon the view of Pilford's Case in 10 Co. and the Books there cited, they resolved that he should have Treble Costs.

Crosse and Winter.

1 Saun. 246.  
Raym. 181.  
1 Mod. 199.  
2 Keb. 496.

**I**n an Action for these Words, Thou art a Thievish Rogue, and didst steal Plate from Wadham College in Oxford.

The Defendant justified, for that he did steal the College Plate.

The Plaintiff replied, De injuria sua propria. The Words were alledged to be spoken in London, and thither the Venire facias was awarded, and there was a Verdict for the Plaintiff.

It was moved in Arrest of Judgment, That there was a Mistake, for the Jury ought to have come out of Oxford; for the Issue is joined upon the Matter in the Justification, and the Words are confessed: And with this agrees Ford and Brooke's Case in 3 Cro. 361. expressly.

But it was resolved by the Court, That this was aided by the late Statute made at Oxford, being tried by a Jury of the proper County where the Action is laid, tho' the Issue upon Pleading may arise out of another Place and County.

1 Saun. 246.  
Hob. 78.

Note, An Act of Parliament was made to continue for three Years, and from thence until the end of the next Session of Parliament and no longer. And it was resolved, That this must be intended a Session, which commences after the three Years expired: For if a Session should be within the three Years, and continue for many Years after, the Act would continue.

*Upon parliament could be  
unless it be passed.*

Note, It cannot be called a Session of Parliament unless the King passes an Act.

The

## The King and Serjeant.

**U**Pon a Certiorari to remove a Conviction of forcible Detainer by the View of the Justices of the Peace upon the Statute of 15 R. 2. the Record returned was, *Quæstæ est nobis Jana Wood Vid', quod quidam pacis Domini Regis perturbatores in domum mansional' existens liberum tenementum ipsius Janæ manu fori ingressi sunt, &c.*

1 Sid. 414.

2 Keb. 449,

505, 718,

584.

*forcible Detainer**v. 1024 28*

Exception was taken to it, because it was not adtunc existens liberum tenementum ipsius Janæ.

To which it was answered, That altho' in an Indictment of Forcible Entry it must appear that the place was the freehold of the Party at the time of the Entry with force, because upon the finding of it a Restitution is to be awarded, and where 'tis generally existens liberum tenementum, it may be referred as well to the time of the Indictment, as to the Entry; yet here 'tis not material, because no Restitution is to be awarded, but the Malefactors being convicted by the View of the Justices are to be fined and imprisoned: And the Precedent in Dr. Dalton's Book of Justices of the Peace, fo. 356. makes no mention of whole Freehold at all: But however here existens liberum tenementum shall be referred to the Complainant, tho' there be not adtunc, and of that Opinion were the Court: But Twissden was of Opinion, That it was not necessary to be alledged in this Case at all. Postea 25.

1 Mod. 73a

*2. 62. 214. 639.*Sir Andrew Henley *versus* Dr. Burstall.

**I**N an Action upon the Case the Plaintiff declared, That he being a Justice of the Peace the Defendant had indicted him for rescuing of a Magabond out of the Constable's hands, who brought him before him, so that the Law could not be executed against him.

Postea 25.

Ante 12, 18,

Raym. 135,

180.

2 Keb. 486,

494.

*Stat. Accon' of**upon a Case**Conspiracy*

It was said, To indict a man for such a Crime in the execution of his Office, was actionable; and it has been often resolved, That an Action would lie for indicting a man of Barretery, and in the Book of Assize 13. for indicting one for Trespass. And to this the Court did incline; but they would further advise. Postea. 25.

The King *versus* Ring.

**E**Rror to reverse a Judgment in an Indictment of Forgery against Ring upon the Statute of 5 El. cap. 4. for that he Scierit subdole & falso fabricavit quoddam falsum factum & scriptum indentatum barganiæ & venditionis, which was said to be intolled, per quod Harrison Keymer & Henry Keymer did sell to J. S.

2 Keb. 129,

245, 501,

532.

*Error.**Indictment of Forgery*



J. S. such Lands: And then sets forth the Indenture verbatim, & quod postea prædict' Ring sciens præd' chartam esse falsam & contrafactam, vi & armis pronunciavit & publicavit; and this was ea intentione ad perturbandum statum, titulum & interesse of Harrison and Henry Keymer, and their Heirs.

*Error.*

*Inrolled.*

The first Error assigned was, That the Indictment was for Forgery of a Deed of Bargain and Sale; and the Indentures set forth were a Lease and Release. Also it did not appear in what Court it was inrolled; and it must be inrolled at one of the four Courts at Westminster, or before the Justices of the Peace at the Sessions, to be a Bargain and Sale; and whereas the Indictment is for Forgery of a Deed, per quod Harrison and Henry Keymer did sell, only one of them was Party to the Deed set forth. And it ought to have been in quo continetur that they did sell, and not, They did sell, whereas the Deed was forged, which, as was said, is oppositum in objecto. And where it is that Sciens prædictam chartam esse falsam vi & armis pronunciavit & publicavit, it was said it ought to have been, Vi & armis prædictam chartam pronunciavit & publicavit: And for this Vaux's Case in 4 Co. was cited, where it is Nich. nesciens prædictum potum cum veneno fore intoxicatum, sed fidem adhibens dictæ persuasioni dicti W. recepit & bibit; and because it was not prædictum venenum recepit & bibit, it was held insufficient; for Indictments must have precise Certainty. fo. 44.

Another Exception was, That this Forgery was said to be ea intentione ad perturbandum statum titulum & interesse of them and their Heirs, and it did not appear that they had a Freehold; and the Punishment inflicted by the Statute is more severe when the Forgery is to disturb the Freehold, than when it only concerns a Chattel: Also it ought to appear in whom the Freehold was at the time of the Forgery, as an Indictment of forcible Entry upon the Statute of 8 H. 6. must express in whom the Freehold was at the time of the Force. Et adjournatur.

Anonymus.

*Amorced.*  
Ante 12.

**U**Pon Process against one, the Sheriff returned a Non est inventus, and an Affidavit was made, That the Defendant was one of the Sheriff's Bailiffs; and the Sheriff was amerced.

Anonymus.

*Force.*  
Ante 12.  
Postea 33.

**I**N Trover and Conversion against Baron and Feme, the Plaintiff declared, Quod ad usum proprium converterunt, which was naught, because it must only be ad usum of the Husband; and yet it may be converterunt if she were present; yet whatever she doth is the Act of her Husband. 1 Cro.

Sir

Sir Andrew Henley and Dr. Burfall.

The Case was moved again, and spoken to in Arrest of Judgment, That no Action would lie for proceeding against a Man by Indictment; and it would discourage all legal Prosecutions of Offences, and 4 Co. 14 b. was cited, where it is resolved, That no Action lies for exhibiting of Articles to a Justice of the Peace against one, tho' the matter be false; nor for preferring a Scandalous Bill in the Star-Chamber, concerning things whereof the Court had Jurisdiction. But an Action upon the Case, or Conspiracy, lies where Life or Member are brought in Jeopardy by a malicious Indictment.

But notwithstanding the Court resolved, That the Plaintiff should have Judgment. Tho' 'twas further alledged, That there was no Issue joined; for in the Pleading and Joining of the Issue the Defendant's Christian Name was mistaken; but the Court would amend that, it being rightly named before in the Record.

Ante 23.

The King and Serjent.

An Indictment of Forcible Entry and Detainer was preferred against Serjent; and the Jury found as to the Detainer with Force, Billa vera; but as to the Entry, Ignoramus: And it was moved to quash this Indictment, because they ought to have found all or none; and of that Opinion was the Court.

Ante 23.

Rumsey and Rawson.

The Case was moved again by Mr. Solicitor, That the Plaintiff having intitled the Parson to Common for 200 Sheep, levant and couchant, and that these Beasts were levant and couchant, and that he put them in by the Licence of the Parson, he ought to have shewn, That the Licence was by Deed, being to take a Profit in alieno solo; and the Statute (which gives remedy after Verdict, when he doth not say, Hic in Curia prolar') doth not aid this: And 'tis necessary to plead a thing by Deed, whose nature requires it.

But to this it was answered by Jones, That a Parole Licence was sufficient in this Case, being only to take the Profit unica vice, there passing no Estate in it: And the Plaintiff had Judgment.

Ante 18.

2 Cro. 574.

Ante 18.

Postea 124.

165.

2 Saun. 327.

328.

2 Ro. Rep.

Pomfret 146, 175.



Pomfret *versus* Ricroft.

Coven.

Ante. 44.

1 Sid. 429.

1 Saun. 321.

2 Keb. 505,

543, 569.

**I**N Covenant the Plaintiff declares, That the Defendant demised unto him a certain Messuage, excepting a piece of Ground whereupon a Pump stood; and grants, that he shall have the free use of the Pump during the term; and covenants, that he should enjoy dimissa præmissa; and assigns a Breach, in that he suffered Antliam prædictam esse fractam & totaliter spoliatam. And to this the Defendant demurs.

And it was said in Maintenance of the Action, That the Defendant having granted the free use of the Pump, was bound to do all things necessary to make his Grant effectual to the Plaintiff, or else he broke his Covenant of Enjoying; and if the Plaintiff should come to repair it, he would be a Trespasser: And of this Opinion was Keyling. But Twisden conceived, That an Action of Covenant would not lie, there being no express Covenant to repair it: Otherwise if he had taken away the Pump; and here he might bring an Action upon the Case, because he lost the use of it; and they Two being only in Court, it was adjourned. Postea 44.

Anonymus.

Nuisance

2 Roll. 139.

No. 2, 141.

2 Keb. 500.

6.2.1688.

**A** Presentment was made in a Leet for erecting of a Glass-house, which was said to be ad magnum nocumentum, per juratores Jurat' pro Dom' Rege, & Dom' Manerii, & tenentibus. It was said, A Man ought not to be punished for erecting any thing necessary to the Exercise of his lawful Trade; but it was answered, That this ought to be in convenient Places, where it may not be a Nuisance. For Twisden said, He had known an Information adjudged against one for erecting of a Brew-house near Serjeants-Inn: But the other Justices doubted, and agreed, That it was unlawful only to erect such things near the King's Palace.

But this Presentment was clearly ill, because it was not ad commune nocumentum: And it was said further, That the Leet was the King's Court, and therefore it ought not to be Jur' pro Dom' Rege & Dom' Manerii, & tenentibus. But the Court held it Surplusage for tenentibus, and good for the King and the Lord of the Manor: For Leets are granted to the Lords as derived out of the Court, for the Case of the Residents within its Jurisdiction.

2 Cro. 382.

Leet  
of Style of Court.

More

More *versus* Lewis.

**I**n an Assumpsit the Plaintiff declares upon Two Promises; Postea 44.  
1 Sid. 413.  
2 Keb. 483,  
507. One was, That in Consideration that he had done him multa & gratissimum servitium, the Defendant promised to pay him Ten Pounds a Year.

The Consideration of the other was, That he had done him multa beneficia.

Upon Non Assumpsit pleaded, and found for the Plaintiff, as to both the Promises, and entire Damages given, it was moved in Arrest of Judgment, That neither of these Considerations were sufficient, especially the last; for there ought to have been some Service particularly expressed.

To which it was answered, That this being after a Verdict, the Court must intend, that the Plaintiff gave in Evidence something that he did, which was a Consideration sufficient; otherwise the Jury would have given no Damages. And a Case was cited in Hutton's Rep. 84. where the Plaintiff in an Assumpsit declared, That in Consideration that she had served the Defendant and his Wife, and done them loyal Service, that he would give her 13 s. 4 d. And a Verdict being found for her, she had Judgment. Sed nota, In the Book nothing was said to be moved in Arrest of Judgment, but the Insufficiency of the Consideration, in respect that it was executed and laid to be done at the Request of the Defendant.

But the Court held clearly, That nothing being particularly expressed in the Consideration of the Second Promise in this Case, it was merely void; and entire Damages being given, the Plaintiff could not have his Judgment. And thereupon Judgment was entered, Quod querens nil capiat per Billam.

Gregory *versus* Eads.

**E**rror to reverse a Judgment given in the Court at Warwick, Postea 39.  
1 Roll. 775.  
No. 6.  
2 Keb. 506,  
535. in an Assumpsit, where the Plaintiff declared of Three Promises, whereof one was found for the Plaintiff, and as to the other two, that the Defendant Non Assumpsit; and Judgment was given for the Plaintiff for that which was found for him; but no Judgment was given as to the other; that the Plaintiff should be amerced pro falso clamore, or, quod Defendens eat inde sine die. And it was assigned for Error, That this Judgment was defective, and ought to be reversed. To which it was answered, That the Judgment ought to stand for so much as was good; and Vid. con.  
2 Cro. 424. 2 Cro. 343. was cited, where in an Action for Words spoken at divers times, the Jury found the Defendant guilty as to all, and gave several Damages; whereupon there was Judgment; and a Writ



of Error brought and assigned, in that the Words spoken at one of the times were not adionable. Which being agreed, the Court resolved, That Judgment should be reversed only quoad them, and should stand for the residue; for utile per inutile non vitiatur. And  
 1 Cro. 442. Slocomb's Case (1 Cro. 319.) where a Writ of Error was brought to reverse a Judgment, given in an Action for Words, and assigned, in that it was entred, Concessum fuit quod querens nil capiat, &c, whereas it should have been Consideratum: Yet because the Words were insufficient, the Court (tho' they held the manner of the Entry erroneous) ordered Judgment to be given, Quod querens nil capiat per Billam. Et adjournatur. Postea 39.

1 Roll. 769.  
 No. 9, 10.

*Juror withdrawn*

Note, It was said by Serjeant Maynard, That after all the Evidence given in an Information, the King's Counsel may, without the Parties Consent, withdraw a Juror, and try it over again: And so he said it was done by Hobart, Attorney General, 5 H. 7. and in the Exchequer by Noy, in King Charles the First's time.

Barkley *versus* Paine.

*Jurisdiction*

In an Assumpsit in an Inferior Court, the Consideration was, That the Plaintiff should solicit a Cause in Chancery.

The Court reversed the Judgment for Want of Jurisdiction. It had also another fault, for it was Defendens in misericordia & capiatur.

Anonymus.

*Error.*

*vi. fo. 2.*

It was moved to quash a Return of Rescous, for that it was Vi & armis in Ballivum meum affraiam fecerunt & e custodia mea adtunc & ibid' rescusserunt, and not Vi & armis rescusserunt. Sed non allocatur; for by reason of adtunc & ibidem, vi & armis mentioned at first, shall be applied to all.

Hanway *versus* Merrey.

2 Keb. 503.

*Arrest*

*abatement*

The Case was, The Defendant had covenanted to pay the Plaintiff a Sum of Money the 24th of June next; whereupon the Plaintiff takes out a Latitat, Teste 3 Maii, returnable the last day of Trinity Term following, and arrested the Defendant upon it: Which being made appear to the Court, they discharged the Arrest. For tho' tis allowed a Man may take out a Latitat before the Money is due; Yet the Party must not be arrested upon it before: And this differs from an Original, which if it bears Teste before the Money be due, it is abateable; but the Latitat is only to bring him in custodia, that the Plaintiff may declare against him by Bill, and after that the Proceedings upon the Latitat cease.

Note, By the Custom of London, the Debtor may be arrested before the Money is due, to make him find Sureties. Hob. 86.

It was also moved, That the Defendant might have Costs, being put to the Charge of Motions to be discharged; but the Court would grant none, it being but for taking out of the Process of the Court. 2 Cro. 667.

Stone's Case.

The Case being moved again, the Court (absente Moreton, & dubitante Rainsford) granted a Writ of Privilege although he were obliged by his Tenure to be the Lord's Reeve, for the Privilege is presumed more antient than the Creation of the Tenure, or at least shall be preferred, in as much as it concerns the Administration of Justice. And Keyling said, An Attorney could not be amerced for not doing Suit to his Lord's Court, at such time as his Attendance is required at Westminster. Ante. 16.

Sir Robert Cotton *versus* Daintry.

In Trover and Conversion for Goods and Money assigned by Commissioners of Bankrupt, upon Not Guilty pleaded, the Question of Fact before the Jury was; Whether Sir A. B. (whose the Goods were) was a Bankrupt? 1 Sid. 411. 2 Keb. 487. 498, 506, 508.

The Plaintiff proved, That he had Silk and other Merchandise in his Warehouse to a very great value; and that upon the Credit of them he took up divers Sums of Money, and afterwards sold them; but could not prove that they were brought in after the Debts contracted; or that he had exported any thing at any time after, or a good while before.

To this the Court delivered their Opinions, That the selling of such Merchandise, if they were but the Effects of his former Trading, (for he had been a Turkey Merchant) which he could not put off immediately upon his ceasing to trade, could not make him a Trader; for the Statute only extends to those that live by Buying and Selling. It was also proved, That he had a 16th part in a Coal-ship, which at present traded to Newcastle, but brought no present Profit to the Owners, the being much in Debt for Repairs. It was said to be resolved in one Crashaw's Case, That the having a part in a Ship did not make a Man a Trader; but that was a Merchant Ship, which the Owners let out to Freight; but the Owners freighted this Ship themselves, and were to have an account of Profit and Loss, and that if an Owner refused to freight, he was compellable. But in regard it could not be proved that Sir A. B. had freighted, or that he had received any Account of Profit, Keyling and Twisden were of Opinion, That it did not make



make him a Trader. Rainsford and Moreton doubted. Wherefore it was offered the Plaintiff's Counsel to have it found Specialy; but they declined it, and the Jury found a General Verdict for the Plaintiff.

*not Regall*

The Day after, Motion was made for a new Trial, Affidavit being made, That the Foreman of the Jury was Brother-in-law to one of the Creditors of Sir A. B. The Court was also informed, That the Plaintiff, after the Verdict, had paid the Jury 4 l. a man, whereas the Rule of Court is, That they coming but out of Hertfordshire, should have but 20 s. a man.

Moreton and Rainsford held neither of these Reasons sufficient. For the first, it was their own Laches that they did not challenge upon it. For the other, They thought the Breach of the Rules of Court ought to be punished, but did not think fit to set aside the Verdict for it.

Twisden for the last Reason held a new Trial was to be granted, and that it was fit to be made an Example to other Juries: For if the Parties may give what they will, it is to be presumed, the Ability of one or other will much incline the Jury to find for him, from whom they may expect the greatest Reward.

2 Keb. 506,  
508.  
Mar. R. 54.  
3 Lev. 312.  
1 Mod. 28.  
Sty. 159.  
Godb. 439.

Keyling held both Reasons sufficient for a new Trial; which could not be, in regard the Court was divided; whereupon Judgment was entered for the Plaintiff, and Execution taken out, and a Writ of Error was brought, which was sealed about an hour before Execution executed. Whereupon it was moved, That the Sheriff might bring the Money into the Court, for that the Writ of Error was a Superseas; for though the Sheriff shall not be in Contempt, if he makes Execution after the Writ, if no Superseas be sued out, for that he had no Notice; yet the Writ of Error immediately upon the Sealing forecloses the Court, so that the Execution made after is to be undone; of which Opinion was the Court, and ordered the Money to be brought in, and not delivered to the Plaintiff.

#### Mr. Justice Moreron's Case.

*For.*  
1 Sid. 88,  
407.  
Raym. 57.  
2 Keb. 502.

3 Cro. 377,  
384.  
Litch. 167.  
Ante. 17.  
Ch. Justice  
Jones 173.  
1 Roll. 913.

HE brought Debt as Executor upon the 2d of Ed. 6. for not setting forth of Cithes due to the Testator. Upon Non debet pleaded, and a Verdict for him, it was moved in Arrest of Judgment, That this being a forfeiture given by the Statute for a Tort done to the Testator, it could not be brought by the Executor. To which it was answered, That this Action was maintainable within the Equity of the Statute of the 4th of Ed. 3. that gives the Executor Trespass de bonis asportatis in vita testatoris. So an Ejectione firmæ lies upon an Ejectment done to the Testator, and Trover and Conversion, where the Conversion was in the time

of the Testator. 1 Cro. adjudged, That an Executor may bring an Action upon the Case against the Sheriff, for an Escape upon Helne Process suffered in his Testator's Life-time. And the Court were clear of Opinion for the Plaintiff, and said, It had been formerly resolved so in the Exchequer Chamber.

The Lady Wortley *versus* Holt.

A Writ of Error was brought to reverse a Judgment given in Dower, in the Common-Pleas, which being affirmed in this Court, a Writ of Error was brought returnable in Parliament, which was discontinued by the Prorogation of the Parliament. 1 Sid. 413.  
2 Keb. 438,  
491, 509.  
1 Mod. 106,  
285.  
Raym. 5.

Another Writ of Error was brought Teste the last Day of the Session of Parliament, viz. 1 March, returnable 19 November, the Day to which it was prorogued.

The Court resolved, That though the first Writ of Error was not discontinued by any Act of the Party, yet this second should be no Superseas. First, It was doubted, whether this Writ of Error bearing Teste the last day of the Session, was not determined by the Prorogation? And it was held clearly, That a Writ of Error returnable ad proximum Parliamentum could not be good: But here the Parliament was prorogued to a Day certain. But however all the Court held, That in regard of the length of time in the Return it should be no Superseas. And Twisden cited a Case between Limmery and Limmery, where a Writ of Error was brought Teste 28 Nov. Returnable 28 Nov. proxime sequent in Parliament, and resolved to be no Superseas, by reason of the length of the Return. Postea. 100,  
266.  
1 Mod. 106.  
1 Sid. 44, 45.  
2 Cro. 341.

Anonymus.

A Information was exhibited against A. B. for causing to be framed, printed and published a Scandalous Libel, Entitled, &c. thereby scandalizing of one C. D. Upon Not guilty pleaded, it appeared upon the Evidence, that after the discovery of the Libel, there were Warrants from the Lord Arlington, Principal Secretary of State, to search the Lodgings of the Defendant, who was suspected to be the Contriver of it, where were found two of these Libels printed. 2 Keb. 502.

The Opinion of the Court was, That this was no Crime within the Information, though he gave no Account how they came there; and the having of a Libel and not delivering of it to a Magistrate, was only punishable in the Star-chamber, unless the Party maliciously published it. 5 Co. 125. B.

Anonymus



Anonymus.

Hob. 192,  
300, 301.  
Dyer, 117.

*Prohibition & Consultation*  
**I**f the Jury upon an Issue joined in a Prohibition upon a Modus Decimandi find a different Modus, yet the Defendant shall not have a Consultation, for it appears he ought not to sue for Tithes in Specie, there being a Modus found.

Termino Sanctæ Trinitatis, Anno 21 Car. II.

In Banco Regis.

Jurado *versus* Gregory.

*Prohibition & Duly*  
1 Sid. 458.  
2 Keb. 511,  
610.  
1 Lev. 267.

**T**he Case was this, There was a Contract at Malaga concerning the Lading of a Ship, and for breach of this which was laid to be upon the Sea, (viz.) That he would not receive 40 Butts of Wine into the Ship according to the Agreement, there was a Libel in a Foreign Admiralty, and Sentence that the Wine should be received into the Ship; which being refused, another Libel was commenced in the Admiralty here in England, reciting the former Sentence, and charging the Defendant with the Breach of it; and a Prohibition was prayed, because it appears the Contract was made upon the Land.

*Duly*  
Vid. Latch  
234.  
Raym. 473.

Against which it was objected by Finch Solicitor, That where Sentence is obtained in a Foreign Admiralty, one may libel for Execution thereof here, because all the Courts of Admiralty in Europe are governed by the Civil Law, and are to be assistant one to another, though the matter were not originally determinable in our Court of Admiralty; and for this he cited a Judgment, 5 Jac. Roll. Tit. Courts, Sect. Admiralty. And to this the Court agreed. But here was no compleat Sentence in the Foreign Admiralty, but only an Award, that the Wine should be received; and now for Breach thereof he sues here, which is in the Nature of an Original Suit, and to have Execution of the Sentence; and this ought not to be, though the Breach were at Sea, it being of a Contract made upon the Land, wherefore they granted a Prohibition.

1 Roll. 929.  
No. 3.

1 Saun. 274,  
275.

1 Sid. 142,  
420.

3 Roll. 195.  
E. No. 1.  
2 Keb. 526,  
533, 671.

*Handlib*  
The King grants bona & catalla felonum, the Grantee shall not have Felons Debts, nor bona & catalla Felonum de se.

Anonymus.

Anonymus.

**A** Conviction was certified of one, for carrying of a Gun, not being qualified according to the Statute, where the Words in the Statute are, Upon due Examination and proof before a Justice of the Peace. 1 Sid. 419. *in mod. l. 17.*

The Court resolved, That that was not intended by Jury, but by Witnesses; and no Writ of Error lies upon such Conviction. Postea 171. *Error*

And an Exception was taken, because it was before such an one, Justice of the Peace, without adding Nec non ad diversas Felonias, Transgressiones, &c. audiend assign'. And the Court agreed so it ought to be in Returns upon Certiorari's to remove Indictments taken at Sessions. But otherwise of Convictions of this nature, for 'tis known to the Court, that the Statute gives them Authority in this Case. Postea 39. *in mod. l. 17.*

The King *versus* Benson.

**I**n an Information against him for Extortion, an Issue was joined; and the day the Jury were returned, the King sent a Writing under his Sign manual, to Sir Thomas Fanshaw Clerk of the Crown, to enter a Cesser of Prosecution: And Palmer Attorney General affirmed, That the King might stay Proceedings; yet notwithstanding, the Court proceeded to swear the Jury, and said, They were not to delay for the great or little Seal; whereupon the Attorney entered a Noli prosequi. 1 Sid. 420. *per rogationem*  
2 Keb. 521.

Anonymus.

**T**rover against Baron and Feme, and laid quod ad usum proprium converterunt; and it was alledged, proprium might be applied only to the Husband; so also if it had been ad usum suum. But the Court held neither had been good; so it was prayed that Judgment might be entered, quod Querens nil capiat per billam: For if it had been quod Defendens eat inde sine die, the Plaintiff could not have brought an Action de novo. \*  
Ante 12, 24.  
Cr. Car. 254.  
2 Keb. 476,  
520. *Judgment*

Note, A Man is outlawed in Middlesex, a Capias utlagatum may be sued out against him into any other County, without a Testatum.

Anonymus.



1 Sam. 227.  
2 Cro. 44.

1 Lev. 153.  
1 Sid. 236.  
1 Roll. 337.  
3 Lev.  
2 Keb. 520.

1 Sid. 419.  
Yel. 113,  
209.  
Moor 701.  
2 Keb. 467,  
520.

Note, The Exchequer-Chamber doth not award a Scire facias ad audiend. Errores; but notice is given to the Parties concerned.

Cr. Car.  
142, 535.  
1 Sid. 143.  
Postea 49.  
1 Sid. 420.  
2 Keb. 525,  
528.

Cabell and Vaughan.

5 Co.  
Whelpdale's  
Case, He  
cannot  
plead *non  
est factum*.  
1 Saun. 291.  
Postea 76,  
135.  
1 Sid. 420.  
2 Keb. 525,  
528.

**I**N an Action of Debt upon a Bond against one, and it appears another was jointly bound with him; wherefore the Defendant demurs. But it was adjudged for the Plaintiff; for the Defendant cannot demur in such case, unless the other Obligor be averred to be living, and also that he sealed and delivered the Bond. 3 Cro. 464, 544. Ascue and Hollingworth's Case, 28 H. 6.3. And if one be bound to two, one Obligee cannot sue unless he avers the other is dead. In B. R. 1651, 1668. Levit & Staneforth. v. 76. 134.

# Perries

## Perry's Case.

In an Information of Forgery against him, there was a *Mistake* Ante 17.  
 trial. And it was moved, That this was aided by the Statute of 21 Jac. the general Purview whereof is extended to any Action, Suit, Bill or Plaint. Then there is a Proviso, which excepts Indiaments and Informations upon Penal Statutes; and this being an Information at Common Law, was not within the Proviso; and it may be taken within the word Suit, for it is *Secta Domini Regis*.

But the Court held it not remedied, either by the Words or Intention of the Act. Vid. ante 17. 1 Sid. 66.

Nokes and Stokes *versus* -----.

They two brought an Action of Debt upon a Bond. The Defendant pleads the Release of one of the Plaintiffs. They pray Oyer of the Release, which was of all Actions, Suits, &c. that he had against the Defendant upon his own Account; and pleads that this Bond was not upon his own Account; and upon this, Issue is taken, and found for the Plaintiff. 2 Keb. 530, 613. 1 Lev. 100, 272.

Now it was moved in Arrest of Judgment, That this Issue was frivolous. And upon the whole matter it appears, That the Plaintiffs have no Cause of Action; for the Release of one Obligee discharge the Bond; and it must be upon his own Account.

But the Court Seriatim delivered their Opinions for the Plaintiffs; for he might take this Bond as a Security of a Debt, with which he was intrusted for another. And the Truth of the Case upon the Evidence was, That the Defendant being charged with the Payment of divers Legacies to Strangers, was requested by one of the Plaintiffs to enter into Bond to him, and the other Plaintiff (who afterwards made the Release) that should be conditioned for the Payment of the Money bequeathed to the Obligees, to the use of the Strangers, which not being done, the Defendant was arrested at the Suit of the Plaintiffs; this being made known to the Plaintiff; who was absent at the taking of the Bond, and knowing nothing of the Suit, was contented to release all Actions he had against the Defendant upon his own Account. 3 Mod. R. 277, 278, 279.

King *versus* Atkins.

Debt upon a Bond of 2000 l. The Defendant demands Oyer of the Condition, which was, That whereas the Plaintiff was bound with the Defendant to the King, That the Defendant should give a true Accompt of such Moneys, as he should receive Postea 78, 204. 1 Sid. 442. 2 Keb. 529; 596, 609, 642, 739, for 747.



for the Excise and Chimney-Money, And that the Defendant should save him harmless from all Payments, or Suits upon that Bond; and pleads that no Suits, Process or Execution was against the Plaintiff upon that Bond, & insin he saved him harmless. The Plaintiff replies a Scire facias issued against him out of the Exchequer upon the Bond, and that he was forced to retain an Attorney, and that he paid 1 s. for his Appearance. To this the Defendant demurs.

*Notice*

Because he did not alledge that he gave him Notice. And this was said not to be like Broughton's Case, 5 Co. For there the Defendant knew the Money was to be paid at the Day, and it was to save him harmless from the single thing, but here from a great many; so that it was requisite he should have Notice. Where the Mesne is bound to acquit the Tenant, the Tenant shall not recover Damages, unless he gives the Mesne Notice that he is distrained, so that he may replevy the Beasts.

But it was said, That no Notice ought to be given, where the thing is an Act of a third Person, as to pay Money when J. S. comes into England.

To which it was answered, That did not lie in the Conscience of either Party; but this was in the Notice of the Obligee. But that which seemed most against the Demurrer in this Case was, That the Defendant having pleaded no Process, &c. he takes upon him the Knowledge of it: And if in the Replication the Plaintiff had alledged Notice, and the Defendant had traversed it, it would have been a Departure; and the Court advised until the next Term. Postea 78.

Vid. 1 Cro.  
54.

*Welsh versus Bell.*

*Silber* 1 Sid. 422, 440.  
2 Keb. 529, 530, 595, 631.  
Raym. 218.  
1 Roll. 667.  
N. 22.  
Roll. 270.  
3 Cro. 783.  
1. 62 Inhab. 294 A

**T**RESPASS quare clausum fregit, and taking of two Horses out of his Cart: The Defendant justifies the taking of them, as a Distress for Rent due to him. And to this the Plaintiff demurs.

First, He could not sever the Horses, but ought to have distrained Cart and all, according to the Book of 20 Ed. 4. 3. Distress of a Cart loaden with Corn, and four Horses in it; adjudged not excessive, because he could not sever the Horses. And in 3 Cro. 7. a Distress is taken between Distress for Rent, and Damage Feasant to this purpose. And the common ground is, That a Distress must be taken so as it may be returned in the same plight. 1 Inst. 47. a.

Secondly, It appeared also in the Declaration, That there was a Servant of the Plaintiff's in the Cart, by reason of which it was alledged, That the Cart and Horses were privileged; for a Horse cannot be distrained upon which a Man is riding. 3 Cro. 549, 596. Et adjournatur.

Twifden

Twisden cited a Case adjudged before Rolle Chief Justice, in Trespass, for taking of his Trunk. The Case was, the Defendant distrained it for Rent, and being informed that there were Things of Value in it, he caused it to be corded to prevent Damage. And for that he was adjudged a Trespasser ab initio.

Anonymus.

**A**N Action on the Case was brought against the Defendant, for taking and keeping of the Plaintiff's Wife from him. And upon Issue joined, the Court was moved to defer the Trial; the Case being that the Wife was Daughter of the Defendant, and taken from him by the Plaintiff without his Consent, and as the Plaintiff affirmed, married to him. Now this Marriage was questioned in the Court Christian: And the Court thought it reasonable that the Trial should be delayed until the Marriage was determined there. But they were informed on the other side, that the Court were ready to give Sentence, That the Marriage was good, and the Defendant had appealed. Wherefore they thought fit that the Trial of the Cause should proceed.

The King *versus* Nelson.

**A**N Order for the keeping of a Bastard-Child being removed by Certiorari, it was moved to have it quashed, because it was ad Sessionem pacis in Com' præd', and doth not say, Ten' pro Com' prædict.

Sed non allocatur: For such Striðness is not required in an Order. But Twisden said, it ought to be so in an Indictment.

It was further alledged, that it ought to appear, That the Child was likely to be chargeable to the Parish; which was agreed. But that was sufficiently set forth in the Order; for upon Reading of it, it appeared, that he was ordered to pay such Charges as the Parish had been at.

Wherefore the Court confirmed the Order, and awarded, That he should pay such Costs as the Parish had been at for Contesting of it; as was done formerly in one Haslefoot's Case: And besides, the Court committed Nelson.

Tapscott and Wooldridge.

**D**Ebt upon a Bond, conditioned to perform Covenants: If the Defendant pleads Performance without demanding Oyer of the Indenture, it is a good Cause of Demurrer.

Kelw. 71, 2;  
1 Sid. 425;  
Cr. Jac. 360;  
460.

Anonymus.



Anonymus.

2 Keb. 535.

**I**n Covenant the Plaintiff declares, That he let the Defendant a House, and that he covenanted to repair it. The Defendant pleads, That it was sufficiently repaired before the Action brought.

The Plaintiff demurs, because he doth not plead, That he repaired it; for it may be the Plaintiff himself did it.

Keyling and Rainsford inclined against the Demurrer; because if it were repaired, be it by any Body, the Plaintiff hath no Damage nor cause of Action.

But Twisden doubted, and afterwards the Parties waived their Demurrer and went to Issue.

Anonymus.

1 Sid. 421.

2 Keb. 531.

Raym. 197.

1 Saun. 294.

1 Mod. 69.

**A**n Information was brought upon the Statute of Usury, for taking, the 30th of May in the 20th year of the King, 42 s. pro deferendo 25 l. for three Quarters of a year, (viz.) from the 30th of August, Anno 19. Upon Not Guilty pleaded, it was found for the King, and moved in Arrest of Judgment, that this was not within the Statute, which extends only where there is an Usurious Contract in the beginning, and there it makes the Security void: Or if there be an Agreement after the Money lent for forbearance, upon Consideration of paying more than the Statute allows for Interest, which is punishable in an Indictment or Information; but the Money is not lost: But in this case, the time of forbearance was past, and the Party might give what he pleased in recompence for it, there being no precedent Agreement to enforce him to it.

Sed non allocatur: For the Court said, They would expound the Statute strictly, and if liberty were allowed in this Case, the Brokers might oppress the People exceedingly by detaining the Pawn, unless the Party would give them what they would please to demand for the time after failure of Payment.

Wingate and Stanton, the Bail of William Stanton.

2 Keb. 536.

Hob. 72.

Cr. Car. 300.

Cr. Jac. 171.

Postea 169.

**I**t was resolved, That where a Scire facias goes against the Bail in this Court, and two Nichils are returned, and Judgment is had thereupon, no Writ of Error can be brought in the Exchequer Chamber, but in the Parliament only.

Also, After such a Return it cannot be assigned for Error, that there was no Capias awarded against the Principal. But in that case the

Bail

Bail is relievable only by Audita querela. But if the Sheriff returns a Scire feci, they may plead it. Fitz. N. B. 104.

Nota, A man cannot release a Debt by his Will.

1 Sid. 421.

The King *versus* Saunders.

Saunders was convicted before two Justices of the Peace upon the Statute of 32 H. 8. cap 6. for carrying of a Gun. Which being removed by Certiorari, was quashed, because it was coram nobis Justiciariis Domini Regis ad pacem suam conservand', wanting the word assignatis.

1 Saund. 263.

1 Sid. 419.

Ante 33.

2 Keb. 521,

537, 694.

Anonymus.

An Indictment was quashed, because it was Justiciarii ad pacem conservand' assign', and not ad pacem Domini Regis; neither would ad pacem publicam serve. And for another Reason, because it was ad Sessionem in Com' tent', and not pro Com': But if it were ad Sessionem in a Borough incorporated, it were good, tho' it were not pro Burgo.

1 Sid. 422.

1 Lev. 175.

Maleverer and Redshaw.

Debt upon a Sheriff's Bond; The Defendant pleads, That there was an Attachment issued out of Chancery against him, returnable Octab' Sanctæ Trin'; and the Condition of this Bond was, that he should appear Crast. Sanctæ Trin. and so he pleads the Statute of 23 H. 6. against it; for that it was taken pro Esiamento & favore.

1 Sid. 456.

2 Saund. 78.

2 Keb. 536,

596, 625.

1 Mod. 135.

The Plaintiff replies, That the Writ was returnable Crastino Sanctæ Trin. and traverses, That the Bond was taken for ease and favour. To which the Defendant demurs, supposing that he should have traversed, that the Writ was returnable Octab. Sanctæ Trin. which is the Matter of the Defendant's Bar, and the other is but the Consequence or Conclusion. Et adjournatur.

V. 11 Co.

10. a.

Gregory *versus* Eades.

Error to reverse a Judgment given in an Inferior Court, where an Assumpsit was brought, and the Plaintiff declared upon three several Promises, and the Jury found two for him, and the other non Assumpsit: And Judgment was given for the two, that he should recover; but no Judgment for the third, that he should be amerced pro falso clamore, or that the Defendant eat inde line die. And for this Cause Error was assigned.

Ante 27.

But Powys argued for the Defendant in the Writ of Error, That the Judgment should be affirmed as to the two Promises, for which

it



it was perfect, and cited Miles and Jacob's Case in Hob. 6. and 2 Cro. 343. where an Action was brought for Words, declared to be spoken at several times, and several Damages given, and Judgment, and a Writ of Error brought, and assigned for Error, that the Words spoken at one of the times were not actionable; which tho' they were not, yet the Judgment was reversed quoad them only.

But the Court said, That it was not like this Case, for here the Judgment was altogether imperfect; and so were inclined to reverse it; but gave further time. Ante 27.

Ward and Culpepper.

Raym. 170.  
1 Sid. 380.  
2 Keb. 409,  
431, 536.  
1 Lev. 255.

**I**n Replevin the Defendant avows for Rent arrear. Upon Non concessit pleaded, the Jury find for the Avowant. The New Statute says, That the Defendant may pray that the Jury should enquire what Rent is arrear, and that he shall have Judgment for so much as they find.

Now the Court was moved, That this might be supplied by a Writ of Enquiry; as if they omit to enquire of the four Points in a Quare Impedit, it may be so supplied, 10 Co. Cheney's Case. But the Court held this could not be so; for the Defendant loseth the advantage of it by not praying of it: As where a Tales is granted, if it be entered ad requisitionem Querentis, or Defendantis, it is not good; wherefore he was bid to take his Judgment quod returnum habeat averiorum, at the Common-Law.

Anonymus.

1 Lev. 299.  
2 Saun. 212,  
213.  
Postea 54,  
102, 103.  
1 Roll. 288.  
N. 3.

**F**our Executors, two of them are under Age; quare, Whether they shall all sue by Attorney?

Note, An Infant may bring an Action against his Guardian, which pleads any thing to his prejudice: Not so of an Attorney.

Wells versus Wells.

1 Lev. 273.  
2 Keb. 531.

**I**n an Assumpsit the Plaintiff declares as Administratrix to her Husband, who in his Life-time agreed with the Defendant, That they should be Partners in making of Bricks for J. S. and after his Death the Defendant promised the Plaintiff in Consideration, That she had promised him to relinquish her Interest in the Partnership, that he would pay her so much Money as her Husband had been out about the Bricks. And upon Non assumpsit pleaded it was found for the Plaintiff.

It was moved in Arrest of Judgment, that here was no Consideration; for the Plaintiff had no Interest in the Partnership, which being joint, must survive to the Defendant; and he ought to have shewn how he relinquished her Interest.

*joint money*

But the Court held it a good Consideration; for it may be there were Covenants, that there should be no Survivorship; (and the Court will extend, after a Verdict, that there were) which tho' they do not sever the joint Interest in Law, yet they give Remedy in Equity, which to debar her self of is a good Consideration, and being laid by way of Reciprocal Promise, there needs no Averment of Performance.

*phrasing off money*

Termo Sancti Michaelis, Anno 21 Car. II.  
In Banco Regis.

William Bates's Case.

**A** Prohibition was prayed to the Commissary of the Arch-deacon of Richmond, to stay a Suit against Bates a Schoolmaster; who, as it was alledged, taught School without the Bishop's Licence; and it was granted, because they endeavoured to turn him out; whereas they could only censure him, he coming in by the Presentation of the Founder.

1 Mod. 3.

*Prohibition*

2 Lev. 22.

In a Feoffment of Tithes and Lands, where there is no Libery; if they do adjudge the Tithes to pass, notwithstanding there is no Libery, a Prohibition will lie.

2 Cro. 270.

In Debt upon a Lease at Will, there must be an Averment that the Lessee occupied the Lands. But it is otherwise upon a Lease for Years.

1 Sid. 423.

1 Mod. 3.

2 Keb. 543.

*Lease*

Anonymus.

**T**he Court was moved to grant an Attachment against a Justice of the Peace, who upon Complaint refused to come and view a Force: But the Court denied it, and directed the Party to bring an Action of Debt for the 100 l. Forfeiture, given by the Statute in that case.

*forfeiture*

It was said by the Court, That in an Execution upon a Statute-Merchant there is no need of a Liberate, as there is upon a Statute-Staple: And in the Case of a Statute-Staple, the Conusor can

*Exhibit*



can bring no Ejectment before the Liberate; neither can the Sheriff upon the Liberate turn the Terre-Tenant out of possession, as he is to do upon an Habere. facias possessionem.

*Dyer versus East.*

*Apungit  
Baron C. Jones*

1 Lev. 7.  
1 Sid. 425.  
1 Mod. 9.  
2 Keb. 554

**A**N Action was brought against the Defendant upon an Indeb. pro diversis Mercimoniis venditis & deliberatis to the Wife, to the use of her Husband, it being for wearing Apparel. And after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Declaration being laid, That the Sale was to the Wife, tho' it was to the use of the Husband, it was not good; as if it had been sold to the Servant of the Plaintiff.

Nevertheless the Court were of Opinion, That it being for her Apparel, and that suitable to her Degree, the Husband was to pay for it: as had been resolved in this King's time, in Scot and Manby's Case in the Exchequer-Chamber, and that the Declaration was well enough.

*Anonymus.*

2 Keb. 553,  
555.

*Principal Interest & Costs*

**T**HE Defendant in an Action of Debt upon a Bond, sued out an Injunction in Chancery; where after the Case had depended for two years, the Court was moved, That the Plaintiff might accept of his Principal, Interest and Charges.

The Court said, If the Defendant comes before Plea pleaded, and makes such a Proffer, they are ex debito Justitiæ to allow it: But now he having delayed the Plaintiff in Chancery two years, it was in their Discretion. And the other three, against the Opinion of Keyling, thought fit to deny it.

*Clarke versus Philips & al.*

1 Saun. 319.  
1 Mod. 10.  
2 Keb. 555.

*Entry to avoid a fine*

*v. 1. Salt. 246.*

*Extinguished*

**U**PON the Trial in an Ejectment, the Title of the Plaintiff's Lessor appeared to be by a Remainder limited to him for Life upon divers other Estates, and that there was a Fine levied, and Proclamations passed; but he, within the five years after his Title accrued, sent two Persons to deliver Declarations upon the Land, as the Course is upon Ejectments brought.

The Court resolved, That this was no Entry or Claim to avoid the Fine, he having given no express Authority to that purpose; and the Confession of Lease, Entry and Duffer, by the Defendant, should not prejudice him in this respect. In this Case Keyling and Twisden were of different Opinions in this Point, (viz.) If he that hath power of Revocation over Lands, &c. makes a Lease for Life, whether it suspends the Power only, as a Lease for years would do, or extinguisheth it as a Feoffment?

The

The King *versus* Monk & al'.

**I**N an Information for a Riot, it was concluded contra formam Statuti 13 H. 4. which appoints Justices of the Peace, upon complaint of Riots, to view and record them. And after Verdict it was moved in Arrest of Judgment, that this Information was not good, it being grounded upon this Statute, which only mentions Riots, and appoints them to be punished in the manner there expressed.

But the Chief Justice Keyling was of Opinion, That it being a Crime at the Common Law, and mentioned in this Statute, the Information was well concluded: But the other Justices inclined to the contrary.

Anonymus.

**D**Ebt upon a Bond conditioned to perform Covenants in an Indenture. The Defendant pleaded, That there were no Covenants contained in the Indenture on his part to be performed. The Plaintiff demands Oyer of the Indenture, which is entred verbatim, and then demurs; which he could not well do before the Entry of it, whereby it becomes part of the Bar; so the cause of the Demurrer appears.

Then it was alledged by Saunders, (whose Hand was to the Plea) That the Plaintiff could not have Judgment, because he had set forth no Breach. But the Court was much offended with him: For they held the Plea in Bar merely for Delay, and advised against the Statute of Westm. 1.

Robinson *versus* Pulford.

**I**N an Assumpsit the Plaintiff declared, That the Defendant in Consideration that the Plaintiff would deliver such silver Threads, and other Wares into the Shop of J. S. that he should require, that he would see him paid.

Now, after Non Assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff had not averred in his Declaration, That J. S. had not paid for the Goods: For the Promise to see him paid was no more than if he had said, If J. S. doth not pay you, I will; in which Case such Averment must have been.

But the Court resolved, That a Promise to pay, and to see him paid, was all one, and the Averment unnecessary.



Rushden *versus* Collins.*Assumpsit*

1 Sid. 425.  
Ante 27.  
1 Mod. 8.  
2 Keb. 552.

**I**N an Assumpsit the Plaintiff declared the Consideration to be, pro opere præantea facto. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That opere was too general, and might intend so inconsiderable a matter as would not amount to a Consideration for the Plaintiff: But they gave Judgment; for they said labore or servitio had been adjudged sufficient.

Lee *versus* Edwards.*Assumpsit*

1 Sid. 428.  
2 Cro. 44.  
1 Sid. 426.  
2 Keb. 559,  
566, 618.  
1 Mod. 14.  
Ante 27.  
1 Lev. 280.

**I**N an Assumpsit the Plaintiff declared, That in Consideration that he would employ his Skill and Pains, and provide Medicaments for, and cure a certain Person of a Phthisick, that he would pay what he deserved; and lays another Promise at the same time in Consideration as aforesaid, and alledges the Promise somewhat varying from the first; and concludes with an Averment, That he had bestowed his Pains, and cured accordingly.

Upon Non Assumpsit pleaded, and a Verdict for the Plaintiff, the Court was moved to stay Judgment, because the Plaintiff had made no Averment of the Cure upon the first Promise, and entire Damages were given; so it was ill in all. But the Court were of Opinion, That in regard he had averred it upon the second Promise; so as it appeared upon Record that the Cure was done, it aided the Omission of it in the first, especially being after a Verdict.

*Assumpsit*

1 Mod. 14.

Nota, There is an Inquisition upon every one's Death that dies in the King's Bench, by the Master of the Crown Office and Coroner.

*Coroner*Pomfret *versus* Roycroft.*Covenant*

Ante 26.  
1 Saun. 321.

**I**N a Writ of Covenant the Plaintiff declared, That the Defendant demised to him an House, with the use of a Pump, and that he suffered it to be so out of Repair that it became useless. To this Declaration the Defendant demurs: And Counsel being heard on either side divers times, the Court delivered their Opinions severally.

Keyling, Rainsford, and Moreton held, that the Action did lie, the Use of the Pump being part of the things demised, which Words make a Covenant, as in 4 Co. Noke's Case, and in 5 Co. Spencer's Case; If a man let an House together with Estovers to be taken in the Wood of the Lessor, and afterwards the Wood is stubbed up, there Covenant lies for the Lessee. And Rainsford put this Case: If a man lets the middle Rooms of his House to one, and the upper to another, and lets the Roof of the House decay,

decay, he conceived Covenant would lie for the Lessee of the middle Rooms. And if a Parson makes a Lease, and then resigns, he is liable to Covenant, as in 12 H. 4. And the Lessee would be at a mischief, for he should be a Trespasser to enter and repair; and if the Lessor ousts the Lessee of any of the things demised, 'tis clear that Covenant lies; and this is as much an ouster as can be in this case, where the Lessor is possessed himself. And so Judgment was given for the Plaintiff, against the Opinion of Twifden, who held strongly to the contrary; for he said he might have an Action upon the Case, and so have remedy for his Damage. Also he held clearly, That he might enter and repair, as if one licences another to lay Pipes in his Ground to convey Water, he may justify an Entry to repair the Pipes. And he cited a Case adjudged in 9 Jac. where one by Licence erected a Cock of Hay in another's Ground: And it was held, That the Owner of the Soil might put in his Beasts into that Ground; but he that had the Licence, might by vertue of that Licence also fence in his Hay. Quando aliquid conceditur, conceditur et id sine quo res ipsa uti non potest: and he said that he never met with a Case where Covenant would lie but upon an actual ouster either by a Stranger that hath eigne Title, or the Lessor himself: And this was a non feafans, and in that he differenced it from the Case of Estovers, being an actual Tort to stub the Wood up; and in Covenant upon an ouster of a Term, if it be not incurred, Judgment shall be to recover the Term it self, as F. N. B. 145. which cannot be in this Case, for the Sheriff cannot put him into possession of the use of the Pump; neither is it fit that he should recover Damages for all the Term, for it may be the Pump will be presently repaired. And he conceived, that if the Lessor cuts down Trees growing upon the Land demised, no Covenant lies, yet the Trees are demised with the rest. Ante 26.

Owen 105.  
Moor 644.  
Cr. Jac. 121.  
Cr. Eliz. 18.  
11 Car. 52.  
Poph. 151.  
2 Rol. Rep.  
143, 152.  
1 Saun. 323.

This Judgment was reversed in the Exchequer Chamber afterwards.  
Poph. 151.

v. 1. lib. 176. fol. 102.  
approvers not out  
the page.

## Anonymus.

**A.** Draws a Bill upon B. to the use of C. and upon Non-payment C. protests the Bill; he cannot sue A. unless he gives him notice that the Bill is protested; for A. may have the Effects of B. in his Hands, by which he may satisfy himself.

1 Mod. Rep. 27.  
Keb. 584.

prolo H  
v. 1. lib. 131.

Note, It was said, if an Action to recover Lands of which a Fine was levied was brought and discontinued by the Demandant, this would not amount to a Claim.

Claim

Glyn



Glyn *versus* Smith.

1 Mod. Rep.  
19.  
2 Keb. 567.

*Scire*  
*Court of B. R. & C. B.*

**A** Scire Facias upon a Record in the King's Bench, where the Action is brought by Original, must alledge a place where the Court was holden; because 'tis Ambulatory, and the Writs returnable there are coram nobis ubicunque tunc fuerimus in Anglia. But it is otherwise upon Records in the Common-Pleas, for that is confined to a certain place by Magna Charta.

Anonymus.

**I**t was moved to quash a Return of a Rescous, because it was Mandavi Ballivis, who took him virtute Warr' præd', And it was said, Mandavi did not imply that it was in Writing. But the Exception was disallowed by the Court.

Anonymus.

*Bail on Audita Querela*

1 Rol. Rep.  
133.

**I**f the Party that brings an Audita Querela be out of Prison, the Court will bail him, though grounded upon a Surmise of a matter of fact, as Payment, &c. But if he be in Prison, not unless it be upon a Specialty.

Parry's Case.

*Detainer of Goods*

**D**ivers Deeds and Evidences were shewn to Counsel for his Opinion of the Title to certain Lands which were to be sold. He delivers them to one Parry a Scrivener, by the Consent of the Parties. Parry finding a Deed to concern the interest of a third person, gives it to him, and upon complaint to the Court, they commanded him to produce the Deed, that it might be delivered back again to the Parties, they conceiving it an Abuse in his Practice, which was under the Regulation of this Court.

Anonymus.

*Jurisdiction*

**I**n Replevin, in the Court at Canterbury, the Defendant avowed for Rent.

*procedendo*

Afterwards this was removed by the Plaintiff into the King's Bench, and the Defendant prayed a Procedendo; because Canterbury was a County of it self and no Assizes there, and so the Cause could not be tried: But the Court denied it, saying, It was their own fault that they had not the Assizes there, and every Subject had the liberty of removing his Suit into a Superior Court. Twisden said, He had formerly known it to be denied in an Ejectment.

Girlin.

Girlington *versus* Pitfield.

**I**N an Action upon the Case, for maliciously prosecuting of an Indictment of Perjury against him, of which he was acquitted; upon Not Guilty pleaded, it appeared upon the Evidence, That the Defendant was a Justice of the Peace, and procured some as Witnesses to appear against him, and his own name was endorsed upon the Indictment to give Evidence.

The Court agreed, That this did not make him a Prosecutor; for if a Justice of the Peace knows any Person that can give Evidence against one that is indicted, he ought to cause him to do it. But it was proved on the Defendant's side, That this Indictment was drawn up by an Order of the Sessions. Wherefore Keyling Chief Justice said, That the Plaintiff deserved to be bound to his Good Behaviour for bringing of this Action.

Horn *versus* Ivy.

**I**N Trespass for taking of a Ship and Sails, the Defendant justified by a Command from the Governours and Society of the Trade into the Canaries, who were incorporated by that Name, and had the sole Trade granted to them, with a forfeiture of all such Goods as should be imported hither from thence, by any Person not of their Company; and that the Ship of the Plaintiff brought Goods from thence. To this the Plaintiff demurred.

His Counsel did not much insist upon the validity of the Patent, because it was a Monopoly; though it was said to be also against divers Statutes, to prohibit Merchants free trading to foreign Parts, as 9 E. 3. cap. 1. 25 Ed. 3. cap. 2. 11 R. 2. cap. 7. and that there could grow no Forfeiture of Goods by Patent, at least not before Conviction. Neither were the words of the Patent very full to this purpose, for they were only, That they should forfeit such Ships and Goods, and be imprisoned as by Law could be inflicted upon the Contemners of the King's Authority, 8 Co. 125. Noy 183. And the Court said the Question was, Whether the King could prohibit the Importation of Foreign Goods; for if he might, the Importation of them would cause them to be forfeited; And the Chief Justice said, The Ship also in which they were shipped: But no Forfeiture of English Goods could grow by Letters Patents. And admitting all this for the Defendant, yet it was said the Plea was naught. First, because he justified by a Command from a Corporation, and did not alledge it to be by Deed: And it was agreed, that a Corporation might employ one in ordinary Services without Deed, as to be Butler. 18 Ed. 4. 8 Br. Corp. 59.



or the like: But one could not appear in an Assize as a Bailiff to a Corporation without Deed. Pl. Com. 797. 12 H. 7. 27. Neither can they licence one to take their Trees without Deed, nor send one to make a Claim to Lands. 9 Ed. 4. 39. They cannot make themselves Disseisors by their Assent without Deed, or command one to enter for a Condition broken. 7 H. 7. 9. Rolle Tit. Corp. 514. Again it was said, The Plea was double, for that the Patent prohibits the Trading thither, and also importing from thence; and 'tis said that he loaded Wines there and brought them hither, so an Offence respecting both Parts, and one would have served. But of these Matters the Court would be advised.

## Burwell's Case.

1 Mod. 20.  
2 Keb. 575,

**U**Pon complaint to two Justices about a Bastard Child; they by the 18 Eliz. order one Reynolds to keep the Child; Upon this Reynolds appeared at Sessions; where they vacated the Order, and referred it back again to the Justices, who do nothing.

The next Sessions after Burwell is judged the reputed Father, and ordered to pay so much a Week to the Parish, until the Child was 12 years old. This was removed into the King's Bench by Certiorari.

And they resolved, That the referring back again to the Justices, by the Justices at Sessions, was not warranted; and that the last Order was insufficient, because it was that he should pay the Parish so much a Week until the Child was 12 years old, whereas the Father might take it away when he pleased; but it ought to have been that he should allow so much a Week so long as it should be chargeable to the Parish; wherefore they bound the Parties to appear at the next Sessions by Recognizance.

## Tomlin and Fuller.

1 Mod. 27.  
5 Co. 100.  
b.

**A** Man hath a Messuage and a Way to it through another's Freehold, and 'tis stopped; then the House is aliened: The Alienee can bring no Action for this Nuisance before Request.

2 Keb. 575,  
583.

If a Man lets a House reserving a Way through it to a Back-house, he cannot come through the House without Request, and that too, at seasonable Times.

Anonymus.

Anonymous.

**I**f the Husband and Wife be arrested in an Action that requires Special Bail, and the Husband puts in Bail for himself, he must put in Bail for his Wife also; but if he lies in Prison, the Wife cannot be let out upon Common Bail. But it is otherwise, if the Husband absconds himself and cannot be arrested.

1 Lev. 216.  
1 Mod. 8.  
2 Cro. 445.  
1 Roll. 983.  
1 Lit. Rep. 18.  
1 Sid. 21.

*Baron's Case*  
*Bail*

Anonymous.

**I**f a Man brings Debt for Rent, and upon his own shewing he demands more than is due, and upon non debet pleaded the Jury find for him, he may remit the overplus, and have Judgment for the residue.

Style 175.  
1 Roll. 785.  
1 Roll. Rep. 335.  
1 Bull. 155.

*Bail*

Note, One was committed for sending of a Note to a Jurymen, (after a privy Verdict was given,) to know what Verdict they gave.

Parris's Case.

**A**n Information was brought against him, for that he fraudulent & deceptive procured one Ann Wigmore to give a Warrant of Attorney to confess a Judgment.

3 Cro. 774.  
Moor 468.  
1 Sid. 431.  
Hard. 331.  
1 Inst. 6.  
2 Roll. 685.  
2 Keb. 572.  
Post. 78.

To this he pleaded Not Guilty, and upon the Trial it was debated, Whether he might be admitted to give Evidence against the Defendant? For if he were convicted, the Court said they should set aside the Judgment. Nevertheless he was sworn, by the Opinion of three Judges, against Twilden, this Suit being for the King. Upon his Trial he was found Guilty, and fined 100 Marks, and ordered to come with a Paper on his Hat expressing the Offence.

Note, No Writ of Error to reverse a Judgment given in an Action, qui tam, &c. lies into the Exchequer-Chamber, because the King is Party; so also upon the Statute de Scandalis Magnatum.

Ante 34.  
Raym. 275.  
cont.

1 Cro. Lord Say's Case.

Perill versus Shaw.

**A** Scire facias was brought against the Bail, who plead that before the Return a Capias was issued out against the Principal; and that he was taken at D. and detained in Prison quousque postea, he paid the Money: The Plaintiff pleads non solvit, then the Defendant demurs.

2 Mod. 304.  
1 Mod. Rep. 24.  
2 Keb. 577.

*pleading*

*h*

And



And it was adjudged for the Plaintiff; for the Defendant's Plea was vitious, because there is no place alledged where the Money was paid; and it is not necessary to be intended to be paid where he was imprisoned: And though the Plaintiff did not demur, but replied; yet when there is a Demurrer, the first fault is fatal.

Sir John Kerle *versus* Osgood.

*Scandal*

1 Lev. 280.  
1 Sid. 432.  
1 Mod. 22.  
2 Keb. 548,  
579.

**A**n Action was brought for these words, spoken of him being a Justice of the Peace, He is a forsworn Justice, and not fit to be a Justice of Peace; if I did see him, I would tell him so to his Face.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that these words were not actionable, because forsworn doth not necessarily intend any judicial Perjury, and there was no Communication of his Office. One said of a Justice of Peace, He is a Blood-sucker, and seeks after Blood; if one will give him a couple of Capons he will do any thing, and held not actionable; because there was nothing to make them relate to his Office. Rolle 29, 56. Nevertheless the Plaintiff had his Judgment by the Opinion of all the Court; for the calling of him forsworn Justice, shews he intended Perjury relating to his Office; to which an Oath is annexed.

Manwood brought an Action for calling of him A corrupt Judge, 4 Co. Cases of Slander. 1 Cro. for calling an Attorney, A cheating Attorney. And Sir John Masham recovered for calling of him Half-eared Justice. Vide Rolle 53. pl. 4. and 4 Co. Stucley's Case. And here the latter words, viz. That he is not fit to sit upon a Bench, shews that he intended the Scandal in his Office; and words shall not be taken in mitiori sensu, so far as to draw them from the general Acceptation; and sermo refert ad conditionem personæ.

Twisden cited a Case, where a Man brought an Action for saying, He was a debauch'd Man, and not fit to be a Justice of the Peace; and not maintainable, because spoken of the time past: If it had been, he is debauched, he said the Action would lie.

Hill *versus* Langley.

*Award*

1 Brown. 112.  
Mod. 849.  
1 Roll. Rep.  
223, 375.  
3 Bulltr. 62.  
2 Keb. 571,  
580.

**D**ebt upon a Bond to perform an Award. After nullum fecere Arbitrium pleaded, the Plaintiff replies and sets forth, That they submitted to the Award of 4, so that they made it by the 16th of Nov. and signified it under the Hands and Seals of two of them, and then alledges the Award under two of their Seals; to which the Defendant demurred, concerning the Award to be void, because

cause the Submission was to four. But the Court gave Judgment for the Plaintiff, according to the Cases in 2 Cro. 276. and 400.

Anonymus.

**I**n an Indictment for the using of a Trade contrary to the Statute of 5 Eliz. it was said, That to keep a Shop within a Country Village was not within the Statute; and it were very inconvenient, that the Inhabitants must go to some great Town upon every occasion. And it was also Juratores dicunt super Sacramentum suum, and not ad tunc & ibidem jurati.

If a Statute appoints an Indictment to be taken at the Quarter Sessions, the Caption must be entered ad 'Quarterial' Session, &c. for ad General Session pacis will not serve.

Jackson *versus* Gabree.

**J**ackson took out a Capias ad satisfaciend' against Gabree and his Wife; the Gaoler lets the Husband escape. The Court was moved, that the Wife might be discharged; alledging that the Husband took no care of her, but let her lie there in a very necessary Condition. They were doubtful what to do in it at the first motion, but did afterwards resolve, That unless the Plaintiff would get the Husband taken again, as he might do, they would discharge the Wife; and they said, the Escape of the Husband was the Escape of the Wife.

Smith and Bowen.

**A**n Infant brought an Assumpsit by his Guardian, and declared, That whereas the Defendant entered into his Close and cut his Grass, that in consideration that he would permit him to make it Hay, and carry it away, he promised to give him six pounds for it; and he also declared for six pounds Debt more that he owed him.

Upon this Declaration the Defendant demurred, supposing it to be no Consideration; for the Infant was not bound by his permission, but might sue him notwithstanding; and then the promise to pay six pounds Debt was not good, because not declared how indebted. But the Court gave Judgment for the Plaintiff.

Sir Henry Frederick Thynne *versus* Sir James Thynne.

**P**asch. 13 Car. 2. B.R. Rot. 448. Upon a Special Issue directed out of Chancery, the Case was thus; One was seised in Tail of the Manor of B. and of two Closes, which in reality were not part,

h 2

but 1 Lev. 27.

1 Mod. 26.  
2 Keb. 583.

*Judicium*

1 Sid. 395.  
2 Keb. 442,  
576.

*Elaps*

1 Mod. 25.  
1 Sid. 41.  
1 Rolle 19.  
N. 41.  
1 Keb. 1.  
2 Keb. 581.  
Hob. 77.  
1 Sid. 446.  
1 Rolle 19.

*Infant*

*Demurrer*

6 Co. 69, 69.  
1 Sid. 190.  
1 Keb. 591.  
2 Rolle 396.  
3 Cro. 524.

*Special Issue*

707.  
2 Keb. 26,  
591, 691,  
716.



but reputed part thereof, and suffered a Recovery only of the Manor with the Appurtenances; and whether the Recovery was a Bar as to the two Closes, was the Question. And in the 16th year of this King, it was resolved by all the Court, and His Chief Justice delivered the Opinion of the Court, That the Lands reputed parcel of the Manor should pass, by reason of the Deed of Covenants to lead the Ales, which explained the intent. Dyer 223. 1 Cro. Sir George Symond's Case, Hob. 177. Dyer 376. Long 5to E. 4. 303. 6 Co. Sir Moyle Finch's Case, Modern Rep. 250.

## Termino Sancti Hill. Anno 21 & 22 Car. II.

### In Banco Regis.

Wilbraham *versus* Snow.

1 Lev. 282.  
1 Sid. 438.  
2 Saun. 47.  
345.  
1 Mod. 12, 30.  
2 Keb. 588.

**I**N an Action of Trover the Plaintiff declares, That he was Owner, and possessed of certain Goods, and sets them forth particularly, and that they came to the Defendant's hands, who converted them, &c. The Defendant pleaded Not Guilty, and the Jury find this Special Verdict;

That the Plaintiff was Sheriff, and that he took the Goods into his Possession by force of a Fieri facias; and that the Defendant (who was also Defendant in the Execution) took them away. And then they demand the Judgment of the Court, if the Plaintiff could maintain this Action.

It was said that he might, Because he was answerable over to the Plaintiff in the Execution, at whose Suit he took them; and could not return that they were taken away: And if he returns, that he hath taken Goods sufficient, and after loses them, he is bound to answer the value as returned. A Bailee of Goods shall bring Trespass, quare bona sua cepit: And Rolle. 5. a Carrier from whom Goods are taken may bring Trover. But it was argued on the other side, That the Property is in the Defendant, notwithstanding the seizure. Dyer 99. a. and Yelverton 44. And the Sheriff had but an Authority in Law to sell, as Commissioners of Bankrupt have, of the Estate of the Bankrupt per 13 Eliz. 7. or Executors upon a Devise, that they shall sell Land, &c. but Trespass he might bring because of the Possession, but Trover cannot be maintained without Property.

Ante 21.

*Spial property in a sheriff  
after seizure on a fieri facias to maintain  
Trover.*

But

But the Court held that the Action was maintainable; and that the reason was the same, as in the Case of the Carrier, and also held that the Defendant's Property ceased by the Seizure: And also that if a Man becomes a Bankrupt after that the Commissioners have granted over his Goods, he cannot meddle with them. 1 Cro. 106. So by the Opinion of Keyling, Rainsford and Moreton, hæsitante Twisden, Judgment was given for the Plaintiff.

Gavell and his Wife *versus* Barker.

**A**N Action was brought for these Words spoken of the Wife, <sup>1 Sid. 438.</sup> You are a Pimp, and a Bawd, and fetch young Gentlemen <sup>2 Keb. 589.</sup> to young Gentlemen, and declared of a Special Damage. The <sup>1 Mod. 31.</sup> Jury gave a Special Verdict, and found the Words spoken; but not the Damage as the Plaintiff had declared. Now, whether the Words were Actionable of themselves, was the Question.

And it was agreed, That no Action would lie for calling one Bawd <sup>Cr. Car. 393.</sup> or Pimp, 1 Cro. 286. Dimock's Case, Rolle 44. pl. 10. But to say one keeps a Bawdy-house, it will lie. 26 H. 8. 14. an Indictment lies for keeping a Bawdy-house, because it is a Common Nuisance; but here the subsequent words expound in what sense the former words should be taken, that is, To bring Gentlemen to Gentlemen for Bawdry, which is as much as keeping a Bawdy-house; and 1 Cro. was cited, where Judgment was given for these words, Thou keepest a House worse than a Bawdy-house, and keepest a Whore in thy House. And in 3 H. 7. it is said, that Constables ought to apprehend Bawds.

But the Court inclined, That the Action would not lie; for a Bawd was not punishable in our Law, unless for keeping of a Bawdy-house, it being a Crime of Ecclesiastical Conusance. Sed adjournatur.

Thomlinson *versus* Hunter.

**T**Respass, Quare clausum fregit & arbores succidit ad valentiam <sup>5 Co. Play-</sup>decem librarum. To which the Defendant demurred gene- <sup>ter's Case. 34.</sup>rally. The Plaintiff prayed Judgment for Breaking of his Close; <sup>3 Cro. 837.</sup>but as to the other, the Declaration was insufficient, because not expressed what kind of Trees.

Anonymus.

**A**Writ of Error was brought upon a Judgment given in Ireland. <sup>Dy. 76. b.</sup>It was held that a Day ought to be given by Rule of Court <sup>2 Keb. 590.</sup>to the Plaintiff, to assign his Errors, or else to nonsuit him; for <sup>2 Bull. 118.</sup>the Defendant could have no Scire facias into Ireland.

Leech



Leech *versus* Widsley.

1 Lev. 283.

2 Keb. 590,

601.

Raym. 185.

**I**N an Action of Trespas for Chasing of his Sheep, and Impounding of them, and there detaining of them until he gave him 12d. per quod one of the Sheep died. The Defendant pleads, that J. S. was seised in Fee of the place Where, and that the Sheep were there Damage feasant, and that he by the Command of J. S. lenite rchaceavit eas, and impounded them until he gave him satisfaction, quæ est eadem Transgressio. The Plaintiff in his Replication entitles himself to Common there. The Defendant rejoins, and says, That the place Where was parcel of a great Masse, wherein the Plaintiff had Common appurtenant, and that the Lord inclosed the place Where, and that the Plaintiff had tempore quo, &c. & semper postea, sufficient Common for all his Sheep levant and couchant. To which the Plaintiff demurs,

First, For that the Bar was insufficient; for the Plaintiff chargeth him with detaining them until he paid him a Shilling; and he pleads, that he detained them until he gave him satisfaction; sed non allocatur.

Vid. 3 Cro.

384. Hill

and Pride-

aux's Case;

but here the

Plaintiff

hath waved

that Ad-

vantage by

pleading

over.

Again, He doth not answer to the killing of the Sheep; sed non allocatur; for he pleads leniter chaceavit; so that if the Sheep did die he is not answerable; neither doth the Plaintiff declare of any extraordinary Chasing; but alledges the dying of the Sheep only in aggravation of the Damages, coming after the per quod, and that is not traversable: As in an Action for Beating of his Servant, per quod servitium amisit, the loss of the Service cannot be traversed.

But that which was most insisted on was, what he alledges in his Resoinder, (viz.) That the Plaintiff had Common sufficient left him for his Sheep levant and couchant upon the Tenements. Whereas he ought to have said, Sufficient ad tenementa prædicta. For it may be the Ground was understocked. Also, 'tis not set forth, that he had free Egress and Regress; the Words of the Statute of Merton are, Tantam pasturam habeant quantum sufficit ad tenementa sua, & quod habeant liberum ingressum: Sed non allocatur, for by his Sheep levant and couchant is intended as many as the Land will maintain, and if there were no Egress or Regress, it ought to come on the other side. So Judgment was given for the Defendant, nisi causa.

Anite 40.

Postea 102,

103.

2 Saun. 212,

213.

2 Cro. 420,

441.

1 Rol. Rep.

388.

Anonymus.

**A**N Infant Executor brings an Action. It was said by Twifden, that it had been adjudged, that he ought to sue by Guardian.

I

Ely

Ely *versus* Ward.

**I**N a Writ of Error to reverse a Judgment given in the Court at Hull; upon an Assumpsit the Plaintiff declared, that it was agreed between them at a place infra Jurisdictionem Curia, That upon Request, &c. and that he requested him at a place infra Jurisdictionem Curia.

1 Sid. 438.  
1 Mod. Rep.  
32.

It was assigned for Error, that this Action ought not to have been brought in Hull, because the Request was not appointed to be made within the Jurisdiction by Agreement. Sed non allocatur, as long as the Agreement and Request were made there, tho' the Request might have been elsewhere.

Another Error was assigned, in that the Precept to the Serjeant at Mace for Returning of the Jury was, Probos & legales homines qui null' affinitat', &c. attingen', whereas the Form of the Venire is, attingunt. Sed non allocatur: For it was held to be as well. Tho' Twisden said, The Form of a Writ ought not to be altered into another Expression of the same signification.

Then the Entry was, Ad quem diem venerunt the Plaintiff and Defendant, & Juratores; and it should have been, Veniunt; sed his non obstantibus, the Judgment was affirmed.

## Anonymus.

**I**T was held, That if the Sheriff returns a Capi Corpus upon a Capias, altho' he has not his Body in Court at the day of the Return, yet no Action can be brought against him, but he is to be amerced for it at the Common-Law. One so taken could not be bailed, but by a Homine Replegiando; and now the Statute of the 23d of H. 6. obliges the Sheriff to take Bail, however the Return is as at the Common-Law, Capi Corpus.

Postea 85.  
1 Sid. 439.  
1 Saund. 60.  
1 Mod. 33,  
57, 240,  
244.  
2 Saund. 60,  
154, 155.  
Postea 85.  
2 Keb. 591,  
626, 630,  
657.

Freeman *versus* Barnes.

**T**Rin. 20 Car. 2. Rot. 554. Error to reverse a Judgment given in Communi Banco in an Ejectment; where, upon Not Guilty pleaded, the Jury found a Special Verdict to this effect: Tenant in Fee makes a Lease for an hundred years, in Trust for himself, to wait upon the Inheritance; the Lessee enters, Cestuy que Trust enters and takes the Profits, and makes several Leases, all which being expired, he makes a Lease for 54 years, and for the corroborating of it levies a Fine with Proclamations; the Lessee enters, 5 years pass. And Tyrrel and Archer (they being the only Judges in the Common-Pleas then) gave Judgment, That the Fine should bar the Lessee for an hundred years. Upon which a Writ of Error

Postea 80.  
Carter 161,  
125.  
1 Sid. 337,  
349, 458.  
Pott. 80, 81;  
2 Keb. 521,  
597, 650.  
Apres 80.  
1 Lev. 270.



Error was brought in this Court, and argued this Term by Levinz for the Plaintiff in the Writ of Error; and Finch Solicitor, for the Defendant.

And for the Reversing of the Judgment, Levinz argued, That this Lease by the Cestuy que Trust, and the Entry of his Lessee, did not dispossess the former Lessee; and then the Fine and Non-claim could not prejudice his Interest, which was not put to a right: For first, the Cestuy que Trust was at least Tenant at Will. So is Littleton, Sect. 464. Cestuy que Use may enter, and hold at the Will of his Feoffees; then his Lease can be no Disseisin, because the Inheritance was in himself. 'Tis true, in some Cases a Man may do an Act which shall divest his own Estate: As if a Stranger disseises Tenant for Life to the use of him in the Reversion, and he assents, Co. Lit. 180. b. The Law shall not construe a Disseisin against the Parties Intention, Rolle 661. He that enters by colour of a void Lease is no Disseisor, 1 Cro. 188. nor any one that enters by Consent, 15 E. 4, 5. b. Neither shall the Interest of the Lessee be divested but at his Election; for this Lease works in point of Contract, and not so violently upon other Mens Interests as Livery doth. In Latch's Rep. 75. Sir Thomas Fisher's Case, Tenant for years lets at Will, the Lessee makes a Lease for years; this works no dispossession. If a Copyholder makes a Lease for years without Licence, the Entry of the Lessee is no Disseisin to the Lord, and he may chuse whether he will take it as a Forfeiture. Rolle 830. Lease for years, upon Condition to be void upon Non-payment of Rent, a demand is made, the Lessor may make a new Lease of the Land, the former Lessee being still in possession. And Blunden and Baugh's Case was cited in 1 Cro. to the same purpose; and that a Fine doth not bar an Interest which is not divested. He quoted also the 1 Inst. 388. 9 Co. 106. and 5 Co. Saffin's Case, where a Fine and Non-claim shall bar the Interest of a Term; yet it appears in 2 Cro. 60. that two Judges were against that Judgment given by the other three. 2 Cro. 659. Tenant at Will makes a Lease for years, and it was held to be no Disseisin volens nolens to him that had the Inheritance. And for Iham and Morris's Case, 1 Cro. 74. it was the Judges Opinion upon Evidence, and there a Fine was levied of the Inheritance, which passed the Trust inclusively; but this Fine was only to establish an Interest for 54 years. Then he argued, that the Inconvenience would be very great to Purchasers, who often keep such Leases and Interests on Foot, tho' they buy the Inheritance, if they should be all barred by Levying of the Fine.

The Solicitor contra. He agreed that a Fine could not bar any Interest, which was not divested at the time of the Fine. He argued first, that the Cestuy que Trust was not Tenant at Will; for a Man shall not be Tenant at Will against his own Conveyance, unless

unless by Construction of Law, to avoid a Court: As in Littleton's Case, where the Cestui que Use enters upon his Feoffee. But tho' the Lessor hath a right to the Possession before the Entry of his Lessee for years; yet when the Lessee enters, as 'tis found in our Case, he doth as much as declare, That Cestui que Trust shall not be Tenant at Will. Indeed the Bargainee of an Estate for years is in actual possession by force of the Statute; yet the Bargainor (in case of a Mortgage) may enter to hold at Will, because there was no Act done to express his Dissent. He agreed also, That no Disseisin was wrought; but there may be an Expulsion without a Disseisin, as Hob. 322. where it is said, If the Lessor puts out his Lessee for years, there is no Disseisin committed; and yet the Lessee hath lost his Estate, and hath but a Right to it, and that whether he will or no: And if he were Tenant at Will, he by making this, and divers Leases before, hath absolutely determined his Will: If Tenant at Will be ousted by a Stranger, and he in Reversion disseised, he may enter again; not where he is the Wrong-doer himself, for that were to make him Tenant at Will against his Will. If Tenant at Will makes a Lease for years, and the Lessee enters, the Tenant at Will is the Disseisor. 2 Cro. 660. 3 Cro. 830. 5 E. 4. 2. And Tenant at Will is intrusted with and hath Power over the Possession. And where it was said, It should be in the Election of the Lessee for 100 years, to take this for an Ejectment or no, he argued that it ought clearly to be in the Election of the Lessor.

For first, It was his own act, and therefore he could best explain quo animo hoc fecit, and that his antecedent Acts had sufficiently done, especially being Cestui que Trust, and having also the Inheritance in him; and he insisted very much upon the Notice that the Law takes of such an Interest, tho' relievable only in Equity. 7 H. 5. 3. Cestui que Use of a Manor, to which an Advowson was appendant, was outlawed, the Church became void; the King brought a Quare Impedit. 2 Cro 512. A Trust of a Chattel, resolved to be forfeit by Attainder, Hob. 214. in that case the King shall have the Land it self, and Process shall issue out of the Exchequer to seize the Land it self; which shews that it hath a legal influence upon the Land, therefore he, and not the Trustee, ought to have the Election. If Cestui que Trust had made a Lease for years, this had been a Disseisin, until 1 R. 3. 5 H. 7. 56. 8 H 7. 8. A Lease of two Acres, habendum the one for Life, the other in Fee, to the use of another; shall not the Cestui que Use determine in which the Inheritance shall be? Again, It is agreed that this Fine conveys away the Trust; shall the Law strain to save the Interest of the Trustee, to occasion a Chancery-Suit? And the Judges ever expounded the Statute of 4 H. 7. strictly, to bind the Right of Strangers, Leonard 99. It was the Chief Baron Man-



wood's Opinion, That he that had a future Interest to Lands, of which a Fine was levied, ought not to have five years after his Interest came in esse, neither is there any Reason to favour long Leases. By the Ancient Law, a Lease for above 40 years was void. Mirror 164, 293. 1st Inst. 46. They are never without suspicion of Fraud: And 3 Co. Twyne's Case, that which is called a Trust, is in plain English a Fraud; and as this is found, it appears by the Circumstances to be almost Fraud apparent. And as to the Inconvenience which was alledged would come to Purchasers, who desire to keep Leases on foot; he answered, That might be prevented by claiming within five years; and it would be mischievous to Purchasers, if it were otherwise, to have such Leases set up against their Titles. Postea. 80, 81.

2 Cro. 240. Note, One makes a Lease, wherein the Lessee covenants to repair, and then bargains and sells part of the Reversion; He shall have an Action of Covenant per 32 H. 8.

Bosville *versus* Coates.

1 Mod. 33.  
2 Keb. 591.

**I**N Debt upon a Bond with Condition, That the Obligor should bring in the Son and Daughter of J. B. at their full Age, to give such Releases as a third Person shall require. The Defendant pleads, That the Son is alive under Age at Doncaster. To which the Plaintiff demurs, and held he might; for it must be taken at their respective Ages. Vid. 5 Co. Justice Wyndham's Case.

Crispe and Jackson *versus* The Mayor and Commonalty of Berwick.

Postea 30.  
1 Sid. 381,  
462.  
Raym. 173.  
1 Mod. 36.  
2 Keb. 391,  
397, 676,  
414, 602.  
676.  
Apres 190.  
1 Lev. 250,  
252.

**I**N a Writ of Covenant, the Plaintiff declared upon an Indenture of a Demise of an House from the Defendants, wherein they covenanted, That the Plaintiffs should enjoy it without the Interruption of any Person whatsoever: And assigned for Breach, That J. S. entered and dispossessed them at Berwick. Upon which the Defendant takes Issue, Whereupon the Plaintiff suggests, That such a place in Northumberland is the next to Berwick; and the Venire is awarded to the Sheriff accordingly, and a Verdict was found for the Plaintiff.

It was moved by Jones in Arrest of Judgment, That here was a Mist-Trial, not added by any Statute; for the last Act, which is the largest, remedies all Trials, so as they be in the proper County; but this is not so: And he said, It ought to have been tried where the Action was laid. As when an Action is brought upon a Charter-Party, and a Breach is assigned in a Foreign Kingdom, it shall be tried where the Charter-Party is dated; and here the Covenant

Covenant bore Date at the Castle of York; and there the Trial ought to have been. 6 Co. Dowdale's Case; And Berwick is part of Scotland, and bound by our Acts of Parliament, because conquered in Edward the Fourth's time: But the course is to name it expressly, because 'tis out of the Realm, and not like to Wales, where the Trials in such Cases shall be out of the prochein County, 19 H. 6 22. for that is a Member of England: Vid. 7 Co. Calvin's Case. But two Precedents being shewn, where the Trials were as it is here, and one of them affirmed in a Writ of Error; also the Case in Roll. tit. Trial, 597. A Writ of Error was brought to reverse a Judgment given in Ireland, and an Error in fact was assigned and tried in a County next to Ireland: The Court ruled the Venire to be well awarded.

Twisden said, The Reason why an Execment would not lie of Lands in Jamaica, or any of the King's foreign Territories, was, Because the Courts here could not command them to do Execution there; for they have no Sheriffs.

This Case having remained two or three Terms since the Postea was returned, and no Continuances entred, one of the Plaintiffs died. and it was doubted whether Judgment could be now entred: And the Secondary said, That they did enter up Judgments two Terms after the Day in Bank, as at the Day in Bank, without any Continuances. And of this Matter the Court would be advised. Postea 90.

Anonymus.

If one, upon Complaint to two Justices, be ordered to keep a Bastard-Child, and this upon an Appeal to the Sessions is revoked; that Person is absolutely discharged; and unless a Father can be found, the Court said, That the Justices of Peace must keep it themselves.

2 Cro. Pri-  
geon's Case,  
341, 350.  
2 Keb. 604.

The Earl of Peterborough *versus* Sir John Mordant.

In an Action upon the Statute de Scandalis Magnatum, for speaking these Words of the Plaintiff, I do not know but my Lord of Peterborough sent Gybbs to take my Purse. After Judgment by Default, and a Writ of Enquiry of Damages returned, it was moved in Arrest of Judgment, That no Action would lie for these Words.

1 Lev. 127,  
227.  
1 Sid. 434.  
2 Mod. 150.  
2 Keb. 537,  
559, 605.

First, He doth not positively charge him with it.

Again, The Words do not import a felonious Taking, Hob. 326. Mason's Case, I charge him with Felony, for taking Money out of the Pocket of H. Stacie, adjudged not actionable. And in 1 Cro. 312. Thou didst set upon me and take my Purse; go before a Justice and I will charge you with Felony. It was held there that no Action would lie.

I 2

But



But the Court gave Judgment for the Plaintiff. As to the first, it was held to be as much as a direct Affirmation; for otherwise one might slander another, and by such a slight Evasion escape an Action.

Twisden said, he knew these Words adjudged actionable, He hides himself for Debt, and for ought I know is a Bankrupt.

And for the Words the Court said, There was difference between an Action grounded upon the Statute de Scandalis Magnatum, and a common Action of Slander. The Chief Justice said, That the Words in the one case shall be taken in mitiori sensu, and in the other in the worst Sense against the Speaker, that the Honour of such Great Persons may be preserved. Moore 55. The Earl of Leicester had Judgment for these Words, My Lord of Leicester is a cruel Man, an Oppressor, and an Enemy to Reformation. Leon. 33. The Lord Abergavenny sued for these Words, My Lord Abergavenny sent for us, and put some of us into the Stocks, some to the Coal-house, and some to the Prison in his House called *Little Ease*; and recovered. Vide Crompton's Jurisdiction of Courts, 13. and Leonard, 336.

Anonymus.

**A**n Indictment was, Compertum fuit per Sacramentum duodecim proborum & legalium hominum, &c. and quashed, because it was not jurat' & onerat'. And the Clerk of the Crown-Office informed the Court, That that was always the Course; also it must be, Adtunc & ibidem jurat', where the Caption is recited to be taken.

William versus Gwyn.

2 Saund. 45.  
2 Keb. 450,  
551, 605.

**E**rror to reverse a Judgment given in Dower in the Grand Sessions in Wales. It appeared by the Record, that the Tenant appeared upon the Summons returned, and Day was given over, & adtunc venit per Attornatum & nihil dicit in barram: Whereupon, Consideratum est quod tertia pars terr' & tenemen' capiatur in man' Domini Regis, and Day given ad audiend' Judicium; at which Day Judgment was given quod recuperet.

It was assigned for Error, That the Court here had awarded a Petit Cape, and yet the Defendant appeared, whereas they should have given Judgment upon the Nient dedire; for a Petit Cape is always upon Default after Appearance, and only to answer the Default: The Grand Cape is before Appearance, to answer the Default and the Demand. Ver. N. B. 97. So it was said, the Court had erred in Judgment; and tho' it were in advantage of the Tenant by the Delay, yet not being by his Prayer as an Essoign granted, where none ought to be, is not Error, but the act of the Court,

Court, as if they should enter a Misericordia for a Capiatur, it were erroneous. 8 Co. 59.  
1 Leon. 152.  
1 Roll. 679.

But the Court answered, That the reason of that was, because it is a parcel of the Judgment, and the King should lose his Fine; But this was only the Awarding of Process more than should be, and in advantage of the Tenant, wherefore they resolved that they could not reverse it for Error. And Twisden said, Admitting it were erroneous, they might then give Judgment in this Court. N. 7.  
1 Roll. Rep. 88.

Anonymus.

A Prohibition was prayed to the Arches for Libelling against one there, for calling Whore and Bawd, because they were but words of Heat; also the Party lived in the Diocess of London, so against 23 H. 8. to cite him there. But the Court would not grant it; for though formerly there hath been divers Opinions touching these words, yet Twisden said, Ever since 8 Car. the Law hath been taken, that they may punish such words, pro reformatione morum. And for the other, it appeared Sentence was given, and that it was too late to pray a Prohibition, when it appears they have Jurisdiction of the Cause, as the Superior Court; and he that would have the benefit of the Statute against citing out of the Diocess, must come before Sentence. 1 Cro.  
1 Sid. 433,  
Ante 7.  
Postea 220,  
343.  
1 Mod. 21.  
2 Keb. 577,  
58.  
V. 2 Inst. 602.  
2 Roll. 318.  
N. 1, 2, 319.  
N. 1, 2.

Anonymus.

FInch, Solicitor, moved for a Prohibition to the Ecclesiastical Court, to stay a Suit for Tithes of Hops, commenced there by the Vicar, upon a Suggestion, that they had paid for all Tithes-Hops so much an Acre to the Parson, time out of mind. But it was denied; for there could be no such Composition time out of mind, Hops not being known in England until Queen Elizabeth's time; for then they were first brought out of Holland, though Beer is mentioned in a Statute in Henry the Fourth's time. 1 Sid. 443,  
447.  
2 Keb. 612.

But it was said by the Court, That perhaps the Vicaridge was endowed time out of mind of the small Tithes, of which nature Hops were. Then the Prescription of paying a Modus to the Parson shall not take them from him; for it shall be taken to have commenced since the Endowment. Postea 107.

Note, If the Matter concerns the whole County, it is to be tried in another County which is indifferent. 2 Roll. 59.  
N. 2.

Hall



Hall *versus* Philips.

2 Keb. 613.

**A**N Information was brought for the forfeiture of a certain quantity of Brandy, and sets forth the two Acts, 13 & 14 Car. 2. c. 23 and 24. of Excise upon that and other Liquors, and then the additional Act of 15 Car. c. 11. wherein it is enacted, That no Foreign imported exciseable Liquors shall be landed, &c. before due Entry be first made thereof, &c. or before the Duty of Excise due and payable for the same be fully satisfied and paid; and that every Warrant for the Landing or Delivery of any such Foreign Liquors shall be signed by the Hand of the said Officer, &c. upon pain that all such Foreign Liquors as shall be landed, &c. contrary to the true intent and meaning thereof, or without the presence of an Officer or Waiter for the Excise, or the Value thereof, shall be forfeited and lost, the one Moiety to the King, the other to him which shall seize, inform, &c. And avers that this Brandy was landed, the Duty not fully satisfied and paid, and without the presence of an Officer or Waiter for the Excise; but doth not aver, that a due Entry was not first made thereof.

Postea 148.

Whereupon it was moved, after a Verdict for the Informer, in Arrest of Judgment; That if either the Duty were paid, or Entry made, or the Landing were in the presence of an Officer, it satisfied the Act, which is in the Disjunctive, and the Word Or shall not be taken Conjunctively, unless the Words are of like nature, as 1 Mar. cap. 3. Maliciously or Contemtuously disturb Preachers; especially in a Penal Law. Besides, if the Act required these three things should be done, then payment would not suffice, without the presence of an Officer at the Landing; the like words are taken Disjunctively in Reniger's Case, Pl. Com.

2 Co. 322.

But it was said on the other side, That the Word Or must be taken here in the Conjunctive, and that for the apparent Inconvenience that would follow; and that the Statute intended all three should be performed, and that an Entry should not suffice without Payment, or Agreement with the Officer, which tantamounts; for otherwise this Act which was made to be further remedial to the King, would rather disappoint this Revenue of Excise given by former Acts, which did also require an Entry to be made; but this Act adds the Penalty for Non-entry, and this Entry is to be made for a Check upon the Officer, that he accompts right to the King. Else it appoints Landing in the presence of the Officer, that it may be observed whether more be landed than is contained in the Warrant for Landing; but never meant that an Entry should suffice without payment; for so, if the Party be a Foreigner or Insolvent, the King loseth his Duty.

And

And the Court gave Judgment for the Informer: But said they would have stay'd until the next Term; but that great Mischief might be done in the Interim, if it should be known that such a Doubt sticks here; and they would not give any Incouragement to the lessening of the King's Revenue.

*Crofton's Case.*

**I**n an Indiamment upon the Act for coming within five Miles of a Corporation. 1 Sid. 209, 439.

It was moved, That no Indiamment lay upon it, because the Act appoints a Penalty of 40*l.* to be recovered by Action of Debt, Bill, Plaint or Information. 1 Sid. 439.

Sed non allocatur: For when a Statute makes an Offence, the King may punish it by Indiamment; but an Information will not lie, when a Statute doth barely prohibit a thing. 1 Mod. 34. 2 Keb. 614. 3 Cro. 643.

Note, It was resolved at Serjeants-Inn, That when a Penalty is to be divided, (viz.) To the King, the Poor and the Informer; if the King alone sue, so that there is no Informer, yet the Poor shall have their part.

*Adrian Lampereve and other Frenchmens Case.*

**A** Motion was made by the Solicitor upon a Special Direction from the King, in behalf of the said Lampereve and other Frenchmen, to have a Certiorari to Bedford-Gaol, where they were committed for Robbery. 1 Mod. 41.

Keyling Chief Justice. I lately attended his Majesty about this matter, and I thought he had been satisfied with what I then said and now repeat, (viz.) That if we should remove them now, we should discharge his Majesty's Justice; for there is no Indiamment found, and none can be found but at Bedford, and the Prosecutors and Witnesses are there; but he might have it tried at the Bar if he pleased, so the only way is to let them stay at Bedford till the Assizes; and then if the Prosecutors appear not, or an Ignoramus be found, they will be discharged by Proclamation; and if the Indiamment be found, then the Judge may take a new Recognizance of the Prosecutors to appear and prosecute here; and you may have a Certiorari now to deliver there, or you may have it there from my Brother Rainsford, who goes that Circuit, to remove all up hither.

Solicitor. I suppose this will satisfy.

Curia. We must acquit our selves of the King's Justice.



In Easter Term following they were brought up hither, and being arraigned upon the Indictment, they pleaded Not Guilty; and some of them desired to be bailed, and the Court said they ought, but it must be done in the Court, because the Bail must be bound Body for Body; and they required 4 Men to be Bail, each worth 300l. Body for Body, and in no Sum certain.

They were afterwards tried per medietat' linguæ, and some of the Aliens were not Frenchmen, and most of them dwelt in Middlesex.

Lady Baltinglass's Case.

**T**he Court denied a Trial at the Bar, because the Costs were not paid upon other Trials, which went against her in other Courts; which the Court here would take Notice of.

2 Keb. 615. Articles were exhibited against a Register of an Ecclesiastical Court, for Misdemeanors done by him in his Office.

2 Roll. 305. He moved for a Prohibition; but it would not be granted, unless they examine him concerning the Articles upon his Oath.

Wright and Johnson.

1 Sid. 440. **A** Stumpfit, To deliver a Gelding in as good Plight as he borrowed him; and avers, That he did not deliver him at all. A Verdict was had for the Plaintiff, yet Judgment was given against him, because the Breach was not laid as the Promise is.

Playters *versus* Sheering

**I**n a Replevin (removed by Recordari,) there was a Nonsuit for want of a Declaration, and whereupon the Defendant made a Suggestion, and took out a Writ of Enquiry upon 17 Car. 2. c. 27. The Plaintiff moved that this might be set aside, because the Nonsuit happened through the sudden Sickness of the Person employed to prosecute.

Curia. This new Statute having taken away the Writ of Second Deliberance, hath made the Plaintiff remediless, unless we help him; therefore we will endeavour it as far as we can. Let the Defendant shew Cause, why he should not accept of a Declaration upon payment of Costs.

Termino Paschæ, Anno 22 Car. II.

In Banco Regis.

Anonymus.

**I**f there be several Contractions between A and B at several times, for several Sums, each Sum under 40 s. and they do all amount to a Sum sufficient to entitle the Superiour Court; they shall be there put in Suit, and not in a Court which is not of Record. And so it was resolved in the Case of the Savoy Court, and Straundforde, 24 C. 2. Also it was said, That if a Man at divers times steals things, all which amount to above 12 d. 'tis Felony Capital.

Prohibition.  
2 Keb. 617.  
1 Sid. 464.  
Postea 73.

In an Accompt after a Judgment Quod computet, the Court assigns Auditors, and they sit upon and return the Accompt when they will; for Day is not given them, and they give the Parties in the interim what time they please; but if the Defendant delays, they return it to the Court, and Process goes out against him.

Nota. Memorandum, On Tuesday April the 26th. Stephen Mosdel, to whom Mr. Lenthal had granted the Office of Marshal of the King's Bench for Life, was sworn Marshal. The Oath was this, (Viz.) You shall swear, That during the time of your being Marshal, you shall well and truly use, exercise and behave your self in the said Office; you shall encrease no Fees, and in all things shall do your Duty in the said Office. &c.

It was resolved, That the said Stephen Mosdel could not afterwards practise as an Attorney of this Court; and that Mr. Lenthal, Marshal in Reversion, had no Privilege.

Anonymus.

**A** Promise was made to give 1000 l. to one for curing his Eyes: and an Assumpsit is brought.

Upon this, the Jury may give less than 1000 l. Damages, if they think fit.

Sic



Sir W. Mewes *versus* Mewes.

2 Keb. 634

**A** Title of Land was tried out of the proper County, upon a feigned Wager, Whether well conveyed or no? (this is the Course of Issues directed out of Chancery.)

Note. In this Case a Bill in Chancery was given in Evidence against the Complainant, tho' held to be but of slight Moment.

Smith's Case.

1 Lev. 288.

1 Mod. 44.

2 Keb. 635.

Raym. 186.

Raym. 166.

186.

**S**Mich and other Commissioners of Sewers which late at White-Chapel, were brought in upon an Attachment awarded against them for a Contempt of this Court. And the Case was thus;

A Certiorari was lately sent and delivered to them out of this Court, (upon special Direction and Recommendation by the King and Council, before whom the Business had been agitated) to remove hither certain Orders and Proceedings of theirs, in order to a Trial of the Right of the Matter in question.

At first they did not allow the Certiorari; but afterwards having allowed it, they proceeded de novo upon the same Matter; and made an Order again, which certain Persons (being the same Persons who procured the Certiorari,) refusing to obey, the Commissioners fined them 10 l. a-piece.

Then a second Certiorari was taken out and delivered to them; after which they imprisoned Persons for not Executing and Obeying of a Warrant made upon their second Order, and for speaking contemptuous Words of the Commissioners, and fined them 5 l. a-piece. Being now questioned by the Court, concerning these Contempts and Misdemeanours, they said, They did this wholly by the Advice of their Counsel Mr. Offley, (who being in Court received a severe Reprimand therefore;) and the Commissioners were committed to Prison.

About a fortnight afterwards, having made and filed their Return, they were brought into Court to receive the Sentence of the Court. And then it was said by them and Coleman their Counsel, That they would not urge any thing in Justification of their not returning their Proceedings; they only offered, That what they did was by the Advice of their Counsel; and that the Clause in 13 Eliz. cap. 9. was so penned as to give a great Occasion of Doubt in this particular, which Clause upon their Desire was read, and is this:

And be it further enacted, &c. That from henceforth the said Commissioners of Sewers, nor any of them shall not be compelled,

or compellable to make any Certificate, or Return of the said Commissioners, or any of them, or of any of the Ordinances, Laws or Doings, by the Authority of any of the said Commissioners, nor shall not have any Fine, Pain or Amercement set upon them, or any of them, or any ways to be molested in Body, Lands or Goods for that Cause; and after the reading thereof, the Court delivered themselves seriatim, as followeth.

Moreton. This is a great Offence and Contempt: The Commissioners of Sewers and their Proceedings are subject to the Jurisdiction of this Court. Sir Henry Mildmay's Case, 2 Cro. 336. and Sir H. Hungate's in our Memoir: If Commissioners of Sewers, or any other inferior Jurisdiction, exceed their Commission, we may reform and restrain them, and it; nay we prohibit them in Cases where they have no Jurisdiction of the Matter: Many Precedents are with us in this present Case, And we cannot answer our Duty to the King, without taking notice of and punishing this Offence. Therefore my Opinion is, That for their not obeying of the first Writ, they be fined 40 Marks apiece, and for their not obeying of the second Writ, 20 Marks apiece.

Rainsford. This is indisputably an Offence and Contempt, and the greater for that it was seconded. It is aggravated too, in that the Commissioners proceeded after they had allowed the Certiorari, and that they fell upon and shewed their Indignation against those Persons, who only pursued the King's Authority; and that this was in a Case which was recommended by the King and Council, to which Recommendation the Commissioners were privy; they had contrary Advice from other Counsel then there, but they would hearken to that Advice which pleased them best: Obedience is that Ligament of the Government, without which all will be turned into Anarchy and Confusion. Without betraying the Trust reposed in us by the King, and violating of our Oaths, we cannot omit to punish this, therefore I agree the Fines: The Reason of the Fines is the disobeying of the Writs; the Reason of their Disproportion is to resemble the Measures the Commissioners observed towards those Persons whom they unduly fined.

Twilden. It was resolved in 23 Car. That this Statute hath no reference to this Court, and that this Clause extends only to Certificates and Returns into Chancery; the Statute speaks of Superseas, &c. which Issue out of the Court of Chancery only; for this Court does not, nor ever did, send out Superseas's, but this Court sends out Certiorari's, which are to bring the Business before the King here, and the words of them are, quia coram nobis terminari volumus & non alibi. What should move that Gentleman to give such Advice (as he did) I cannot imagine: I suppose there is more in the matter than we know, and 'tis a strange thing that these Commissioners should ask Counsel, whether they should obey the



King's Writ or no? Especially when it went out upon such particular Direction and Recommendation. 'Tis some Mitigation, that they had such Advice of Counsel; otherwise I should not stick to fine them 100 l. apiece. We are bound to take care of the support of the Government. I agree the fines.

Keyling Chief Justice. It is provided by 23 H. 8. cap. 5. That the Laws, Acts, &c. to be made by the Commissioners of Sewers, should stand good and effectual, &c. no longer than the Commission endured, except they were engrossed in Parchment, and certified under their Seals, into the King's Court of Chancery; and then the King's Royal Assent to be had to the same, &c. But that was altered by this of 13 Eliz. whereby it is enacted, That their Laws, &c. should stand and continue in force, without any such Certificate to be made thereof into the Chancery; and then a little after in this Statute follows the Clause which hath been read, and that refers wholly to Certificates, or Returns to be made into the Chancery, for the purpose afore-mentioned. 'Tis plain, the Clause refers not to this Court, for it speaks of returning their Commissions; now their Commissions were never returnable into this Court; this Court cannot be ousted of its Jurisdiction without special Words; here is the last Appeal, the King himself sits here, and that in Person if he pleases, and his Predecessors have so done; and the King ought to have an Account of what is done below in inferiour Jurisdictions. 'Tis for avoiding of Oppressions, and other Mischiefs. To deny and oppose this, and to set up uncontrollable Jurisdictions below, tends manifestly to a Commonwealth; and we ought, and we shall take care that there be no such Thing in our Days. I know there is a great Clamour, so soon as an inferiour Jurisdiction is touched; and 'tis thought we deal hardly with them: But unless we will suffer this Court to be dissolved, and the Prerogative of the King to be encroached upon, we must oppose our selves to these Proceedings.

I have a great respect for these Persons the Commissioners, but 'tis but usque ad aras. When the Jurisdiction of the Crown, the Justice of the Kingdom, and the Duty of my Place is concerned, I ought not to spare my best Friends. Some Precedents have been cited in this Case, and many more might; there are two memorable Records cited. 1 Cro. concerning Persons which contemned the King's Writ and their Penalties. I agree the fines, and hereby we do not go so high as our Predecessors have gone hundreds of years ago.

Nota. This Proceeding and Sentence of the Court, was upon Confession of the Commissioners; the Court forthwith making an Entry and Record of their Confession.

In an Assize only, where the Writ is returnable into this Court it is apud Westmonaster; but in all other Cases, where Writs are returnable out of Chancery into this Court, they are returnable Ubicunque, &c.

The King *versus* Jane D. —

**S**HE was indicted for stealing of several Things, and pleading Not guilty, and a Jury sworn to try her; the Witnesses not appearing, were suspected to be tampered with by the Prisoner; and the Jury were discharged, and the Trial put off. Vid. 1 Inst. 227. b.

Wife's Case.

**A**N Order of the Justices of Peace, for the maintenance of a Poor Woman, was confirmed, tho' it appeared she was able of Body to work: But the Justices of the Peace are Judges of that.

Cousin's Case.

**E**Rror to reverse a Fine for Infancy: Now'twas moved, That the Party being in Court she might be inspected, and the Inspection recorded: And there was produced and read a Copy of the Register-Book, sworn to be a true one, and several Affidavits of her Age. 2 Roll. 572;  
573.

Curia. Let the Inspection be now recorded; the Issue of her Infancy may be tried at any time hereafter, tho' she comes of Age.

Nota. A Prisoner in the King's-Bench that lies in the Common Side, pays no fees for his Lodging.

Anonymus.

**I**T was said by Twisden, That if two submit to an Award, this contains not a Reciprocal Promise to perform; but there must be an express Promise to ground an Action upon.

Nota. A Fine which was set two or three Terms since, was this Term set aside, because of some surreptitious Practice and Misinformation to the Judge.



Aubery *versus* James.

<sup>1</sup> Sid. 444.  
<sup>2</sup> Keb. 623,

**A**ssault, Battery and Wounding: The Defendant insisted, for that he being Master of a Ship, commanded the Plaintiff to do some Service in the Ship, which he refusing to do, he moderate castigavit the Plaintiff, prout ei bene licuit.

The Plaintiff maintains his Declaration absque hoc quod moderate castigavit, and Issue was taken thereupon.

*Negativum  
infinitum.*

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Issue was not well joined; for non moderate castigavit doth not necessarily imply that he did beat him at all, and so no direct Traverse to the Defendant's Justification, which immoderate castigavit would have been: But, De injuria sua propria absque aliqua tali causa would have been the most formal Replication.

(\* Which  
was a mi-  
stake.)

But the Justices held, That it would serve as it was after a Verdict, tho' the Statute at Oxford, 16 Car. 2. the last and most aiding Act of Jeofails be \* expired, and that de injuria sua propria, not adding absque aliqua tali causa, hath been held good after a Verdict.

Green *versus* Cubit.

<sup>2</sup> Keb. 626,  
630, 637,

**E**rror to reverse a Judgment, given in the Court at Norwich, in Debt upon a Bond; where the Plaintiff declared that the Defendant per scriptum suum Obligatorium, at a certain place there, became bound, &c.

The Defendant pleaded, That he was in Prison, & scriptum predictum was obtained by Duress; which was found against the Defendant, and Judgment given accordingly.

The Errors assigned were first, Because he declares of a Writing Obligatory, and doth not say sigillo Defendantis sigillar'. 3 Cro. 571. Declaration in Covenant was held insufficient for the same Cause.

Secondly, There is no place where the Defendant alledgeth himself to be in Prison; and being in an Inferiour Court, it shall not have any aid of Intendment.

But the Court over-ruled the first, because the Plea of the Defendant confesses the Debt; and the second, because the Imprisonment must of necessity refer to the place where the Plaintiff declares the Bond to be made: For the Defendant pleaded, That he was then in Prison; wherefore they affirmed the Judgment. 3 Cro. 55.

<sup>2</sup> Cro. 420. 3 Cro. 737. 19 H. 6. 15, 16.

Baldway and Ouston.

**D**Ebt upon a Bond, the Condition was, That the Defendant should pay such Costs as should be stated by two Arbitrators by them chosen. 2 Keb. 624.

He pleaded, That none were stated.

The Plaintiff replied, That the Defendant did not bring in his Bill.

To which it was demurred: For tho' if the Defendant were the Cause that no Award was made, it was as much a Forfeiture of his Bond, as not to perform it would be; yet here there was a precedent Act of the Plaintiff's necessary, (viz.) To choose an Arbitrator, which he ought to have shewn before any Fault could be assigned in the Defendant, in not bringing in of his Bill. And to this the Court did incline: Sed adjournatur.

*Nota.* It was said, Tho' every Innkeeper may detain a Horse until he is paid for his Meat, yet he cannot sell him; for that was good only by the Custom of London. Yelv. 67.  
2 Roll. 85.  
N. 5.  
2 Brownl.  
255.  
Moor 877.

Haspurt and Wills.

**A** Custom was alledged in the City of Norwich, That in regard they maintained a Common Key, for the Unlading of such Goods as were brought up the River in Vessels to the said City, that every Vessel passing thro' the same River by the said Key, should pay a certain Sum. 1 Mod. 47.  
104.  
2 Keb. 624,  
665.  
1 Sid. 454.

It was held a void Custom as to those Vessels which did not unlade at the said Key, nor any other place in the City; there being no Benefit rebounding to them from the Maintenance of the Key, they only passing by, and were bound for another Place, and therefore could have no Imposition upon them: But if they had received their Freight at the said Key, it might extend to them. Raym. 232.

And Coleman said, The last Session of Parliament there was Complaint made against the Governour of Gravesend, who would have prescribed to have Two Shillings and Sixpence of every Boat that passed by the Fort there: And it was held to be unreasonable.

Anonymus.

**T**Rover and Conversion for a pair of Curtains and Gallance was held insufficient, for the Uncertainty of what was meant by a Pair in this Case. 3 Saun, 74.  
contra.  
1 Mod. 46.  
contra.  
Post 106, 114  
2 Keb. 623.  
1 Sid. 445.

Bernard



Bernatd *versus* Bernard.

1 Lev. 289.  
2 Keb. 626,  
635, 646,  
650, 696,  
699, 708,  
716.

**E**rror to reverse a Judgment in the Court of Hull, upon an Assumpſit, where the Plaintiff declared upon two Promises; the first was upon an Indebitatus infra Jurisdictionem Curiae, for Money lent.

The Error assigned was, That the Loan did not appear to be within the Jurisdiction; but upon view of the Record it was adunc & ibidem.

The other Promise was, That there being Communication between the Plaintiff and Defendant concerning a House, which was said to be at Hull-Bridge, which the Plaintiff sold him, the Money being unpaid, and the Defendant unable; in consideration that the Plaintiff would release to him the said Debt, he promised to deliver him up the Possession of the House by a certain Day. Then he avers, that tho' he released him, yet the Defendant had not delivered him up the Possession, licet sapius requisitus.

It was assigned for Error, That the House was not expressed to be within the Jurisdiction; for the performance of the Promise must be as well within the Jurisdiction, as the Promise it self: But it is not material, tho' there be other foreign Circumstances in the Case; as Assumpſit upon a Promise to re-deliver a House at Hull, which the Plaintiff lent the Defendant at Hull to ride to Beverly: This that Court had Conſulance of, tho' Beverly was out of the Jurisdiction. And tho' the House were alledged to be at Hull-Bridge, that Hall be intended a Mill by it self, and no part of Hull: And of that Opinion was Twiſden; but Keyling otherwise.

Another Error was assigned, That there was no Request laid, which ought to have been, being a collateral Thing, (viz.) To deliver up Possession of a House.

Sed non allocatur: For being to be done at a time certain, there was no need of Request; but if no time had been set, he would have had time during his Life, unless hastened by Request.

Another Error assigned was, That the Style of the Court was, Placita coram Majore, &c. virtute Literarum Patentium, H. 6: yet the issuing out Process, and filing Bail, was entered secund' consuetud' Cur'; And for this, 1 Cro. 143. Long and Nethercote's Case was cited, where the same matter was held to be Error; for the Court being erected within time of Memory, could have no Custom to warrant their Proceedings. Sed non allocatur: For it is according to Law, and the just Course of their Court.

But Twiſden said, If it had been secund' consuetud' Cur' de tempore d'ont memorie ne court, it had been ill.

Girling.

*Girling versus Alders.*

**I**N a Prohibition to the Court of the Honour of Eye, the Case was, One contracted with another for divers parcels of Malt, the Money to be paid for each parcel being under Forty Shillings; and he levied divers Plaints thereupon in the said Court. Wherefore the Court here granted a Prohibition; because tho' they be several Contracts, yet soasmuch as the Plaintiff might have joined them all in one Action, he ought so to have done, and sued here, and not put the Defendant to an unnecessary Vexation, no more than he can split an entire Debt into divers, to give the Inferiour Court Jurisdiction in fraudem Legis. Ante 65.  
2 Keb. 617.

*Heskett versus Lee.*

**P**asch. 21. Car. 2. Rot. 408. Error to reverse a Common Recovery had in the County Palatine of Lancaster, against an Infant. 1 Sid. 446.  
2 Saund. 94.  
95.

The first Error was assigned in a Variance between the Writ and the Count; the Writ was of Lands in Bikerstaffe, and the Count was Bikerstaffe, (5 Rep. 46. Isfeild for Iffeild; but there the Court suffered it to be amended, being the default of the Clerk :) Sed non allocatur, quia idem sonant. 1 Mod. 48.  
Hob. 196.  
2 Keb. 627.

Another Error was assigned in the Entry of the Admission of the Guardian. Which was thus: Concess' est per Cur' quod Johannes Molineux Armig', sequatur pro Thoma Heskett Armig', ut Guardian' pradiet. Thomæ in p'sito terræ versus Lee: Whereas it was said it should have been, ad comparandum & defendendum, and this is ad sequendum, which is a Form proper only for the Demandant, and so is the 2d Cro. 641. And the Reason why Infants are bound by Recoveries when Guardians are assigned them, is, Because if they suffer any Wrong, they have an Action against the Guardian, in whose default it was: Whereas if the Infant should bring an Action in this Case and declare against Molineux, That he was admitted as Guardian, to defend for him; if Issue were taken upon it by this Record, the Trial would be against him.

Again, It is sequatur pro Thoma ut Guardianus, and it is but similitudinary.

Another Error was assigned in the Entry of the Appearance, which was, pradiet Thomas Heskett per pradiet Johannem Molineux qui specialiter admissus est per Cur' ad sequend' pro pradiet Tho' venit in propria persona & defendit jus suum: Where it was said, It must be taken that the Tenant appeared in Person, and not the Guardian, and a Recovery suffered by an Infant where he appears by Attorney, or in proper Person, is erroneous, Rolle 371.

L

But



But notwithstanding these Errors the Court affirmed the Recovery.

Cr. Car. 307.

Cro. Eliz.  
158, 172.  
r Sid. 173.

For the Admission of the Guardian ad sequend' is proper enough; for it signifies no more than to follow the Cause: And in many Cases the Tenant or Defendant doth prosecute, as in Voucher, praying Tales, carrying down Trials by Proviso, &c. and in Replevin the Abolwant is Ador, and in suffering of a Recovery the Tenant is the main Agent, being to his Use if no other be declared. And it was an Error assigned in the Lord Newport and Mildmay's Case, as appeareth by the Record; yet it seems it was taken to be so plain, as not fit to be insisted on: Wherefore there is nothing of it in the Report of the Case, 1 Cro. 224. yet there was all Endeavour imaginable used to reverse that Recovery; and divers other Precedents there are of the same manner of Entry: And if it can appear to the Court, that there was a Guardian admitted, the Form of the Entry shall not be so severely examined, as in the 4 Rep. 53. where there was no Entry of any Admission of the Guardian by the Court at all; yet it appearing quod venit per Guardianum, the Court would not reverse the Judgment for Error. And for the Book of the 2 Cro. 641. there were other Reasons which reversed the Judgment, and the Admission ad prosequendum was not mentioned, until the Court upon the other Matters had resolved the Reversal: And the Books there cited do not at all prove it to be Error. And ad sequend' ut Guardianum is not at all amiss; for Ut many times notes an Identity; Seisius ut de feodo, makes Conusance ut Ballivus, &c. And for the Entry of the Appearance, it may be taken, that the Guardian came in proper Person, and so it ought to be: But if propria persona refers to the Infant, he must have reversed the Recovery during his Non-age. And so Twifden said, it hath been resolved in this Court lately. Vid. Roll. 1st Part 171. and 2d Part 573.

Anonymus.

**S**Crogs, the King's Sergeant, moved to have a Trial at Bar, in an Indictment of Perjury, and for some further Time urging that it was the King's Case.

The Chief Justice said, The King was no otherwise concerned in it, than in maintenance of the Common Justice of the Realm: It was usually the Subject's Interest, and his Prosecution, and therefore must not deviate from the Course in Civil Causes, and not to be resembled with Causes wherein the King is concerned in point of Interest.

Anonymus.

## Anonymus.

**A** Prohibition was prayed to stay a Suit for Tithes of Wood. The Plaintiff suggested, That he had a House in the Parish, and that the Wood was cut for Fuel burnt in his House.

But the Court said, That this would not serve, unless it were expressed, that the House was for maintenance of Husbandry, by reason of which the Parson had uberiores Decimas.

1 Mod. 50.  
2 Keb. 623.  
1 Sid. 447.  
Hetly 88,  
110.  
2 Inst. 652.  
1 Rolle 642.  
N. 36. 644.  
N. 3. 645.  
N. 9, 10.  
3 Cro. 609.  
Moor 917.  
Cr. Car. 113.  
2 Keb. 629.

Barett *versus* Milward, & al.

**A** Scire facias was awarded against the Defendants upon a Recognizance, which they entered into as Bail for a Plaintiff in a Writ of Error, that he should prosecute it with Effect, or pay the Money if the Judgment were affirmed.

They plead, That he did prosecute it with Effect, and that the Judgment was not yet affirmed.

The Plaintiff replied, Protestando, That they did not prosecute with effect, Pro placito. That the Judgment was affirmed by the Justices of the Common Bench, and Barons de gradu de la Coif, Et hoc paratus est verificare per Recordum. To which the Defendants demurred generally,

Because it was not alleged, That there were Six Justices and Barons present when the Judgment was affirmed: For 27 Eliz. c. 8. which gives them Authority, requires, that there should be Six at the least.

Sed non allocator: For the Defendant should then have pleaded Nul tiel Record; for if there were not Six, their Proceedings were coram non Judice.

Nota, If a Certiorari be not returned, so that an Alias be awarded, the Return must be as upon the first Writ, and the other must be returned quod ante adventum istius brevis the Matter was certified.

Gybbons *versus* North.

**I**n an Assumpsit the Plaintiff declared, That whereas at the Defendant's Request he was bound with him in a Bond of 200l. he in Consideratione inde promised to save him harmless, and obliged himself, his Heirs and Executors in 200l. to the Performance of it; and the Money not being paid, the Defendant did not save him harmless: But, per debitum legis processum, he was forced to pay the Money.

1 Sid. 447.  
2 Keb. 630,  
631.



The Defendant demurred, because he did not alledge, That he did not pay him 200 l. For obliging of himself in the Penalty of 200 l. to save him harmless, he hath Election either to save him harmless, or pay 200 l.

But the Court gave Judgment for the Plaintiff; for there is no Election in this case, being no more than an ordinary Promise to save harmless. And this Action is brought upon the Plaintiff's Dampnification, which is a Breach, and he doth not demand the 200 l. Also a Verbal Contract cannot create a Penalty to oblige the heir.

*Jordan versus Forett.*

1 Sid. 449.  
1 Mod. 50.  
1 Keb. 632.

**E**RROr to reverse a Judgment given against an Executor, in Debt in the Common Pleas, where the Executor pleaded divers Judgments formerly obtained against him; and the last he pleads thus: That one Eliz. H. in eadem Curia implacitasset, &c. and recovered in Trinity Term, but expresses not in what Year; and there, upon a general Demurrer, Judgment was given for the Plaintiff, and it was assigned for Error,

That this Uncertainty in respect of Time was good at least upon a general Demurrer.

But the Court affirmed the Judgment: For if such Pleading should be allowed, it would be very inconvenient to the Plaintiff, and very difficult to find out the Record, and then how should he plead that it was kept on foot by fraud, or such like? But if it had been ascertained when the Plea commenced, though no time alledged when the Judgment was obtained, yet that would have been good; for the Continuances would have directed to the finding of it.

Twisden said, That the Course in this Court was in a Scire facias upon a Judgment, to say quod cum recuperasset, without alledging any Time: But in the Common Pleas they set forth the Term.

*Putt versus Vincent.*

2 Keb. 632.  
Postea 135.  
Ante 34.

**I**N Debt for 3900 l. the Plaintiff declared upon Articles of Agreement, wherein Putt covenanted to convey certain Lands to one Nosworthy; and there are also certain Covenants from Nosworthy to the Plaintiff, and from the Defendant Vincent; who after Imparance pleads, That Nosworthy sealed the Deed, and is still alive.

To which the Plaintiff demurred.

And it was alledged by Jones, That this being after Imparance, could not be pleaded, it being only in Abatement, and that he commences his Plea Actio non, as if it were a Plea in Bar.

And the Court inclined that it was insufficient for both Causes: But then it was said, It appears by the Deed to which Nosworthy was a Party, that the Plaintiff could not sue the Defendant alone, and so of his own shewing he could not have Judgment. But it was answered, That it did not appear, that Nosworthy ever sealed the Deed. Et adjournatur, Postea 135.

Gifford *versus* Perkins.

**I**N Debt upon a Bond entred into to Eliz Perkins, who was the Plaintiff's Wife, and he as her Administrator brings this Action. The Defendant pleads, That he delivered the Bond to one Eliz. Perkins his Sister, quæ obiit sola & innupta, absque hoc that he delivered it to Elizabeth Perkins the Plaintiff's Wife; and to that the Plaintiff demurs specially. For if it be taken that there are two of the name, the Defendant should have pleaded non est factum; for it amounts to no more. Or at least he ought to have induced his Plea, that there were two Elizabeth Perkins. But this Traverse is designed to bring the Marriage in question, which is not to be tried now. Wherefore the Court gave Judgment for the Plaintiff. 1 Sid. 450.  
2 Keb. 633.

Twisden said, If the Issue be, Whether the Wife of such a Man or no? This is to be tried per Pais: For if she be a Wife de facto, it serves upon the Issue: But the Loyalty of Matrimony is to be tried by the Certificate of the Bishop only. 2 Roll. 585.  
1 Lev. 41.

## Dighton's Case.

**A** Mandamus was prayed to the Corporation of Stratford Super Avon, to restore Dighton the Town-Clerk. 1 Lev. 291.  
Postea 82.

They returned their Letters Patents of Incorporation, whereby they had Authority to grant the Office of Town-Clerk Durante beneplacito; and that he was amoved from his Office by the Mayor and Burgeses. 2 Keb. 641,  
656.  
1 Sid. 461.  
Raym. 188.

It was said, That here appeared no Cause of Amoval upon the Return, which was manifestly needless, having Authority to turn them out at their Pleasure. But Twisden said, It hath been held, that where any such like Power is to chuse one into a Judicial Office, as an Alderman, whose place concerns Judicature; that they cannot amove him without Cause: But this was in a Ministerial Office. Postea 324.

It was further moved, That it did not appear, that they had discharged him by any matter in Writing under Seal; and it could not be by Parol. Sed non allocatur; for it is returned to be done by the Mayor and Burgeses; and a Corporation cannot do any thing by Parol. Post 82.

An



2 Saun. 148.  
1 Mod. 62.  
2 Keb. 641.

An Executoꝝ obtained Judgment in Debt in this Court, and was afterwards upon an Information here convicted of forging the Will; It was also made void by Sentence in the Ecclesiastical Court. Whereupon the Court was moved to vacate the Judgment, which they ordered accordingly, and the cause of vacating thereof to be entred upon the Record. Vide Ante in Paris's Case. 49.

King *versus* Atkins.

Ante 35, 36.  
1 Sid. 442.  
2 Keb. 529,  
596, 609,  
642.

**I**N Debt upon a Bond, the Condition recited, That whereas the Plaintiff was bound with the Defendant being an Excise-Man, that he should render a true Account in the Exchequer; that the Defendant should save him harmless at all times, &c. The Defendant pleaded non fuit damnificatus. The Plaintiff replied, That a Scire facias issued out against him, &c. To which the Defendant demurred, because he did not alledge that he gave Notice.

This being spoken to divers times, the Court thought Notice not requisite in this Case no more than upon a Promise to pay so much at the others Marriage, or Return into England. vid. Hob.

1 Roll. 463.  
Hob. 51, 68.  
Postea 204.

112, 113. 1 Bulst. 12 and 13. where it is held, Upon a Promise Notice is not necessary, otherwise upon a Bond; because of the Penalty. Ante 35, 36.

Chester *versus* Wilson.

1 Sid. 452.  
2 Saund. 96.  
Raym. 187.  
2 Keb. 41,  
642.  
2 Roll. 86.  
A. 1. 403.  
L. 3.  
3 Cro. 696.

**T**RIN. 21 Car. 2. Rot. 498. The Case was two Joint-tenants, the one grants, bargains and sells all his Estate and Interest to the other. It was held clearly by all the Court, That this amounted to a Release; but it must be pleaded quod relaxavit; for one Joint-tenant cannot grant to another.

Wilson *versus* Armorer.

Postea 87,  
106.  
Raym. 207.  
2 Keb. 643,  
667, 719.  
1 Lev. 287.

**I**N Debt against the Heir, upon the Bond of his Ancestoꝝ, who pleaded riens per discent, the Jury find a Special Verdict to this Effect;

That the Father was seised of a Manor in Fee, and made a Feoffment of it, excepting two Closes, for the life of the Feoffoꝝ only, and referred it to the Judgment of the Court, whether these Closes descended to the Defendant or not? So that the Question was, Whether the Closes were well excepted, or passed by the Feoffment?

And it was argued by Levinz for the Plaintiff, That by these words, the two Closes were totally excepted, and that the Law should reject the latter words; because they cannot take effect according to the Parties Intention, to reserve to the Feoffoꝝ a particular Estate. If one surrendered a Copyhold to the use of J. S.

and his Heirs, which Estate is to begin after his Death, adjudged in 2 Rolle 261. a present Fee simple passed, 3 Cap. 334. A Man said to his Son being upon his Last Stand forth, Enstace my Son, reserving an Estate for mine and my Wife's Life, I do give you this Land, to you and your Heirs. Resolved there that this is a good Feoffment. Moor 950. Poph. 49. A Man possessed of a Term in an House in the Right of his Wife, granted it, excepting the Cellar, pro usu suo proprio, and held that by these words it was altogether excepted out of the Grant. 1 Anderson 129.

Serjeant Turner contra, For that it is but one Sentence, and cited 38 H. 6. 38. An Advowson was granted, saving the Presentation to the Grantor during his life, and held void; and Pl. Com. 156. where it is said, if a Termor granted his Term after his Death, it is void. But if in two Sentences, as to grant his Term, Habendum after his Death, there the Habendum is only void. Et adjournatur. Postea 87, 106.

*Love versus Wyndham.*

**A**N Action upon the Case, upon an Issue directed out of Chancery, upon a Special Verdict, the Case was, George Searl being seised of the Manor of N. devised the same to Nich. Love for 99 years, if three Lives should so long live. N. Love devised it to Dulcibell his Wife, the remainder to Nich. his Son for life, and if he the said N. the Son should die without Issue, then to Barnaby Love, the Plaintiff. The Executor assented, and whether the Devise to Barnaby were good, was the Question. Jones for the Plaintiff; This is a good possibility. I will make two Points.

1 Lev. 290.  
1 Sid. 450.  
1 Mod. 50,  
114.  
1 Rolle 611,  
612.  
2 Keb. 637.  
2 Cha. Rep.  
14.

First, If a Termor devise first to one and then to another, whether he may devise it over?

Secondly, Whether the Limitation here after the Death without Issue, be a good Limitation over?

First, he may make a third Limitation, which is a Possibility upon a Possibility; at least he may make two or three such Limitations over. I can't certainly say where it will end. It can't be denied, but that a Termor may Devise first to one for life, and after to another. 8 Co. 95. But I say he may go further, and that will appear by Reason and Authority.

First, By Reason. The Reason given, why the executoy Devise in the first case is good, is, because 'tis in Construction of Law, as much as if he had devised it to the last first, (if the first Man should die within the Term) and then had devised, that the first should hold during life; and without such a Transposition it cannot be good. Now this being the way of Operation, there is no Reason why he may not devise it to one after the Death of two,



two, as well as after the death of one. This would be so in Grants, were it not that a Certainty is required in them, 1 Cro. 155. which is not required in Devises.

## Termino Sanctæ Trinitatis Anno 22 Car. II.

### In Banco Regis.

Freeman *versus* Barnes.

Ante 55, 56,  
57.  
1 Sid. 349,  
458.  
1 Lev. 270.  
Hard. 448.  
m. c.  
2 Keb. 521,  
597, 650.  
Dav. 55.

**E**RROR to reverse a Judgment in an Ejectione firmæ in the Common Pleas; the Case upon a Special Verdict was thus.

The Marques of Winchester being seised in Fee of the Lands in Question the 8 of July, 9 Jac. lets them to Sir An. Mayne for 100 years, in Trust for the Marques and his Heirs, and to wait upon the Inheritance. The Lessee enters, afterwards the Marques enters, and lets it to the Lord Darcy for 7 years, and then lets it to the Spanish Embassador for 7 years, which Leases being expired, Sir A. M. demises to Freeman for a Term yet unexpired. (this Demise is not found to be upon the Land.) Afterwards the Lord Marques demises to Germin for 54 years, upon Consideration of Money, and reserves a Rent, and covenants to levy a Fine, for the Assurance of the Term, which was afterwards done with Proclamation. Germin enters, and five years passed without any Claim made; which Lease by mean Assignment came to Wicherly, the Lessor of the Defendant, who was Plaintiff in the Common Pleas, and there had Judgment.

The only Question upon this Special Verdict was, Whether the Fine and Non-Claim should bar the interest of Sir A. M. the Lessee in Trust?

Cr. Car. 110.

This Case having been argued three several times at the Bar; the Court did this Term deliver their Opinions, and did all agree, That the Judgment ought to be affirmed.

It was considered quid operator by the Entry of the Marques, and they all, except Moreton, held, that Prima facie, he was Tenant at Will, as Littleton Sect. 463. is, There the Feoffee enters upon the Feoffee to his use; but that the Entry of Germin his Lessee did oust Freeman the Assignee of Sir A. M. which Assignment, though not found to be upon the Land, was good, as the Chief Justice held, because the two former Leases made by the Marques were expired, so he became Tenant at Will again; but then he making of another

2 Cro. 660.

ther Lease, and the Lessee entring, this must work an ouster, and so the Fine would bar the Right: For they agreed, That a Fine regularly shall not work upon an Interest which is not divested; though in some Cases it doth, as upon the Interest of a Term, according to Saffin's Case, 5 Co. which yet cannot be divested; but though the first Entry make but a Tenancy at Will, yet taking upon him to make Leases, that is enough to declare his Intent to dispossess his Lessee in Trust. Besides he reserves a Rent, and covenants for quiet Enjoyment, and to make further Assurance, which could not stand with the Interest of the Lessee in Trust: And for the Cases that were objected, as Blunden and Baugh's 1 Cro. 220 where it is adjudged, That the Entry of the Lessee for years of Tenant at Will, should be no Disseisin, nolens volens, to him that had the Freehold, for there was no Intention of the Parties to make it so; and here the Law shall rather give the Election to him which had the Inheritance to make it a Divesting, than the Lessee; or rather, as the Chief Justice said, The Law construes such Acts to amount to a Divesting, or not Divesting, as is most agreeable to the Intention of the Parties, and the Right of the thing; which distinguishes it also from the Case of Powlsley and Blackman, cited in Blunden and Baugh's Case; where the Mortgagee held at the Will of the Mortgagee, and let for years, the Lessee entred, and held notwithstanding, that the Mortgagee might divest. So Sir Tho. Fishe's Case, in Latch's Rep. where Tenant for years lets at Will, and the Lessee makes a Lease for years, and then the Remainder is granted over; this Grant is held to be good; which, whether by the Remainder there be understood the Interest of the Lessee, or the Fee-simple; yet it is no more than my Lord Nottingham's Case, and not like the Case in question; For there the Lessee held the Interest in his own Right, and here but in Trust; and for the Case in Noy's Reports 23. Twisden said, he wholly rejected that Authority; for it was but an Abridgment of Cases by Serjeant Size, who when he was a Student borrowed Noy's Reports, and abridged them for his own use.

The Case was this; Tenant in Fee makes a Lease for years, then levies a Fine before Entry of the Lessee: It is held there, though five years pass the Lessee is not barred; which is directly against the Resolution in Saffin's Case; and for Authority in this Case, they relied upon the Case of Iham and Morris, in 1 Cro. 109, 110. where upon Evidence it was resolved by the Justices, That if the Cestuy que Trust of a Lease for years, purchaseth the Inheritance, and occupies the Land, and levies a Fine, that this after five years shall bar the Term, which is not so strong as this Case; because there were no Leases made, and Entry thereupon; and the Trust must pass inclusively by the Fine, as is re-



solved in divers Books; especially in this Case, where it is to wait upon the Inheritance, which though it arises but out of a Term, yet it shall follow the Land, and go to the Heir.

And for the Inconveniencies which were objected, That if any Man purchased Land by Fine, that he could not keep on foot Mortgages and Leases, which it is often convenient to do, the Chief Justice declared his Opinion, That in that Case the Fine should not bar, there not being any Intention of the Parties to that purpose.

And as to the other, that where the Mortgagor continuing in Possession, levies a Fine, this should bar the Mortgagee; he denied that also, and grounded himself upon Fermour's Case, in 3 Cro. and Twifden agreed. Ante 55, 56, 57.

#### Dighton's Case.

1 Lev. 291.  
Dev. 77.  
1 Vent. 461.  
1 Sid. 461.  
Raym. 188.  
2 Keb. 641,  
656.

**H**E brought a Mandamus to be restored to his place of Town-Clerk of Stratford super Avon. The Corporation returned Letters Patents, whereby they were empowered to chuse one into the Office of Town-Clerk, Durante beneplacito, and that they removed him from his Office.

Jones prayed that he might be restored notwithstanding, because no Cause of his Removal was returned, nor that they had ever summoned him; whereas if they had, he might peradventure have shewed such Reasons as would have moved them to have continued him; and he cited Warren's Case, 2 Cro, 540. who was restored to his Aldermanship, where the Return was as here.

But the Court held, That they could not in this Case, (although they confessed they knew the Merits of the Person) help him: And the Chief Justice said, That the Case of the Alderman differed, for he is a part of the Corporation, which is a continuing Body, and no Member thereof can be displaced at the will of the rest; but it is otherwise in case of such an Office as this; the Cases cited agree, if it had been a Common Council Man, as was returned at first.

Post. 342.

And here they said it were fit a Scire facias went out of Chancery, to repeal these Letters Patents as unreasonable. If they had been to chuse a Town-Clerk generally, it had been for his life; or if to chuse one, provided they might turn him out at their Will and Pleasure; yet they could not have done so without Cause, as Twifden said: But here the Authority is absolute, to chuse him Durante beneplacito, which it was said was not so much to be admired at, for the Offices of Judicature in the Courts at Westminster are so determinable.

Foot *versus* Berkley.

**P**Asc. 19 Car. 2. Rot. 1618. In a Writ of Error to reverse a Judgment, given in an Ejectione firmæ in C. Banco. The Case upon a Special Verdict was this: The Prior of Bodmin was seised in Fee, and 29 H. 8. demised to John Monday and others for 96 years, at the Rent of 60 l. per Annum.

The Possessions of the Priory afterwards came to the Crown, and descended to Queen Eliz. who in the 42d year of her Reign granted to John Monday for 30 years, Habendum after the end of the former Term, under the same yearly Rent. The Inheritance was afterwards conveyed to divers in trust for the late Queen-Mother; who in 14 Car. 1. demised to Francis Godolphin in this manner, reciting that Queen Eliz. in the 32d year of her Reign, (whereas it was the 42d) demised to J. M. (and did not recite for what Term) to commence after the Expiration of the Term for 96 years, granted by the Prior, reserving 60 l. Rent, did demise to the said Francis for 21 years, to commence after the end of the Term granted by the said recited Letters Patents of Queen Eliz. They find no Lease made in the 32d year of the Queen, &c. Now whether Godolphin's Lease should begin from the making, (which if it should, it is for some years expired,) or to extend while the Lease made in 42 Eliz. should determine, was the sole question.

And by the Opinion of the Court of Common Pleas, (Tyrrel only to the contrary,) it was adjudged, That the Lease should commence presently upon the making: And a Writ of Error being brought, after divers Arguments at Bar, it was this Term argued by the Court, and resolved, That the Judgment should be affirmed.

They held, That every Lease for years must have a certain beginning and a certain end, either expressed, or referred to something which may make it so: And here it is referred to a Lease, whereas there is not any such Lease; therefore it is to begin presently; as if it had been to commence from an impossible Date. Co. Lit. 46. b. A Lease made from the 30th of February shall commence presently; and it is the same thing, when to begin from the end of a Lease misrecited, for it is no more than to refer it to nothing, Br. Leases 62. 1 Cro. 220. Miller and John's Case, Dy. 116. 2 Roll. 55. 4 Rep. 53. Palmer's Case, Bondlow's Rep. 35. 1 Anderson 3. Leonard Mount's Case. And whereas it was objected in this Case, that the Date is not material, and that there was enough expressed to ascertain what Lease the Parties intended; and the Case in Hob. 129. was cited, where one made a Lease, Habendum a Festo Purificationis, and then reciting by his Deed, that he had made

Postea 88.  
1 Lev. 234.  
1 Sid. 460.  
Carter 147.  
2 Keb. 321,  
480, 514,  
611, 654,  
673.

Cr. Car 399.

Postea 137.



a Lease to commence a Festo Annunciationis, granted the said Reversion: The Court held this there a good Grant.

It was answered, That the Lease here was tied up by such precise Words, to begin upon the Determination of the Lease granted by the said recited Letters Patents, that this cannot be referred to a Lease which varies in the Date, tho' agreeing in other Circumstances; (yet the certainty of the Term is not recited neither;) And tho' a Lease is good without a Date, yet when a Lease is recited to be of one Date, a Lease which bears another Date cannot be said to be the said recited Lease. And the Case in Hobart is very different from this Case; for in the Grant of the Reversion, the Recital of the particular Estate is not material in the case of a common Person, so long as he hath a Reversion in him: But here one Term is recited to give a certainty of Commencement to another; and if here be none such, it must begin presently; so that however, the Grant is good also here, either to pass the Reversion with Attornment, or being by Indenture to take effect upon the Forfeiture, &c. of the former Term. Pl. Com. 453.

Twisden said, Walter Chief Baron reported this Case to be adjudged, where one made a Lease to begin from the Nativity of our Lord last past: It was resolved it should begin presently, and not from Christmas, for that was the Feast of the Nativity; and to take it from the Nativity, the time would have been efflured many times over, and that in the King's Case, such a Lease would be void. But here, if the Case was thus, that A. had made a Lease to B. for 30 years, to commence from the 1st of March, and then A. reciting the former Lease to be made the 1st of May for 30 years, had made another Lease, to commence from the end of B's Lease; the Lease should have commenced after the former ended. But it cannot be so in the Case in question, because tied up to the said recited Deed.

Another Objection was, Because this being by Indenture, the Parties should be estopped to say, that there was no such Lease; and this was much insisted on by Serjeant Maynard, in his Argument for the Plaintiff.

To which it was answered, That this being by Recital, could work no Estoppel.

Again, The Question is not now between the Parties to the Lease, and tho' they and their Assignees might be bound in pleading, yet being in a Special Verdict, the Court shall judge according to the truth. And so is Isham and Morrice's Case, 1 Cro. 77. And Rawlins's Case, 4 Rep. is between the Parties themselves. So they all resolved, That Judgment should be affirmed.

Cr. Car. 110.

The

The King *versus* Bates.

**E**rror to reverse a Judgment given in an Information at the Assizes in Norwich, because the Information was exhibited before Justice Moreton, and Justice Rainsford; and the Trial and Judgment was at the next Assizes before two other Judges. 2 Keb. 657.

And it was objected by Pemberton, That their Commission of Oyer and Terminer doth not empower them to determine any thing which was not commenced before them; and so is Bro. tit. Commission 24. And in the 4th Inst. my Lord Coke saith, That the Statute of Edward the 6th extends only to Justices of Gaol-delivery; Sed non allocatur. 1 E. 6. c. 7.

For the Court said, The Statute extends to both; and so hath been the constant Practice.

Secondly, There was no good Trial; for there is an Award of a Venire facias, but no Writ certified. But this was also over-ruled; for it is the Course of the Assizes not to make out any Writ.

Thirdly, Issue is joined by the Clerk of Assize, which the Court said ought to be; for he is Attorney General there.

Parker *versus* Welby.

**T**HE Plaintiff brought an Action upon the Case against the Defendant, and declared, That he sued out a Latitat against a third Person, directed to the Defendant, being Sheriff; who thereupon arrested him, and after let him go at large: And then he returned a Cepi Corpus & paratum habuit, ubi revera he had not his Body at the day. Ante 55.  
1 Sid. 439.  
2 Saun. 154.

To this Declaration the Defendant demurred, supposing that no Action would lie for this false Return; for the Statute of 23 H. 6. obliges the Sheriff to let to Bail; and if he hath not the Body at the day, he is to be amerced. Ante 55.  
1 Mod. 57.  
240, 244

But the Court were of opinion for the Plaintiff: For it shall be intended that he let him go without Bail; and if he did not, he ought to have pleaded the Statute of 23 H. 6. which is a private Law: And at the Common Law a Man could not be let at large in such case, without a Homine Replegiando. 2 Keb. 591.  
1 Sid. 22,  
23, 24

Or else he might have pleaded Not Guilty, and given the Statute in Evidence: And so it is adjudged in Layton and Gardiner's Case, 3 Cro. 460. So Moor, plaito 996. 2 Cro. 352. & 3 Cro. 624. where the Defendant pleaded, That he let to Bail according to the Statute; and the Plaintiff was barred. 2 Saun. 155.  
contra.  
1 Mod. 58.  
1 Sid. 22,  
23, 24.  
2 Saun. 60.

Twisden



1 Mod. 33,  
57, 58.

Twisden cited a Case in this Court, Paschæ 21 Car. 1. Rot. 616. between Franklyn and Andrews; where the Plaintiff declared as in this Case. And the Defendant pleaded the Statute, and that he let him at large upon Sureties, and traversed absque hoc, that he returned his Writ Aliter aut alio modo: To which the Plaintiff demurred.

It was resolved,

First, That the Sheriff could return nothing but Cepi Corpus: and he was then amerced, because he offered to make a Special Return.

Secondly, That where the Sheriff let the Parties out to Bail, and he made such Return; that it was no false Return, and therefore he should not have traversed absque hoc, that he returned Aliter vel alio modo; as in Maintenance, where the Defendant justifies, for that the Party could not speak English, and therefore he went with him to instruct his Counsel: He shall traverse absque hoc, that he maintained Aliter; because that he maintained would not do, tho' it be justifiable. So in that case the Court ordered it to be entered upon the Roll, that Judgment was given for the Plaintiff, quia Traversa fuit mala.

2 Saun. 153.  
Ante 55.

So here they ordered it to be entered, because the Defendant did not plead the Statute of 23 H. 6.

#### Hocking versus Matthews.

1 Lev. 292.  
1 Sid. 463.  
2 Keb. 636,  
663.

**A**N Action upon the Case was brought for maliciously Impleading, and causing him to be excommunicated in the Ecclesiastical Court; whereby he was taken upon an Excom' Cap', and imprisoned, until he got himself absolved.

The Defendant pleaded not guilty, and found against him: And it was afterwards moved in Arrest of Judgment, That the Declaration was not good; for no Action will lie for suing a Man in the Spiritual Court, tho' without cause, no more than in suing in the Temporal Courts. For Fitz. N. B. is, That a Man shall not be punished for bringing the King's Writs. So Hob. Waterer and Freeman's Case. And it hath been lately held, That no Action will lie for an Indictment of Treasons, tho' false; but an Action of the Case will lie for suing in Court Christian for a Temporal Cause.

T. Jones 132.  
Raym. 418.  
2 Mod. 52.

But the Court in this Cause gave Judgment for the Plaintiff: For tho' in an Action between Party and Party in the Ecclesiastical Court; where (if the matter goes for the Defendant) he shall have his Costs, no Action will lie if the Court hath Jurisdiction: Yet where there is a Citation ex Officio, and that is prosecuted maliciously without ground, the Party shall have his Action; for in such Suit he can have no Costs: And so is Carlion and

Mills's

Mill's Case adjudged, 1 Cro. 291. and this shall be so intended after the Verdict, or otherwise the Defendant should have shewed it to be otherwise, and justified. And Rainsford said, without Cause, shall be understood without any Libel or legal Proceedings against him.

Anonymus.

**I**N Debt upon an Obligation to perform an Award, which was to pay the Rent mentioned in such an Indenture: He that pleads Performance of this Award, needs not to set forth the Indenture, but refer generally to it: But if it be to be paid in such manner, and at such times as is expressed in the Indenture, then it must be set forth at large.

The like of an Award for Payment of Money given by a Will.

Wilson *versus* Armorer.

**T**HE Case was argued again this Term by Coleman for the Plaintiff, who argued, That the Exception takes the two Closes wholly out of the Grant, and that no Modification can be annexed to it, 3 Cro. 657. and Moor Pl. 747. A Lease was made for certain Lands, excepting a Close, and Covenants were for quiet Enjoyment of the Premises. The Lessee disturbed the Plaintiff's Possession in the Close excepted, yet he could not bring a Writ of Covenant; for by the Exception it is as much as if it had been never mentioned; and in this Case the Liberty being secundum formam Chartæ, could not work upon these Closes. The Case of Hodge and Croffe, cited in Hob. 171. was this: A Man gave Lands to another, Habendum to him and his Heirs after the Death of the Feoffor, and Liberty secundum formam Chartæ: Resolved a void Feoffment, and relied upon the Case in 1 Anderson 129. as full in the Point, a Lease of an House, excepting a Chamber pro usu suo proprio & occupatione: It was held that he might assign.

Weston contra. This Exception is altogether void; for it cannot be for the Life of the Feoffor only, Bro. tit. Reservation 13. and it shall not except the whole fee against the Intention of the Parties; for then the ill wording of his Exception should give him above twice as much as otherwise he should have had; and it is but one entire Sentence, and taking it all together it must have an effect, which the Law doth not admit, and is therefore to be wholly rejected: As where a Man grants his Term after his death, the Grant is void. Otherwise where he grants his Term habendum after his death; for there the last Sentence is rejected, Hob. 171. The Case of the Exception of the Chamber is not alike; for excepting it for his own use are apt words to give him Power to dispose of it at his pleasure.

Keyling.



Keyling, Rainsford and Moreton held the Exception good for the entire Fee.

Twisden, That it was wholly void, because one Sentence. Plus postea 106. Antea 78.

*Sympton versus Quinley.*

<sup>2</sup> Keb. 672, <sup>679.</sup> <sup>1</sup> Lev. 172. <sup>1</sup> Lev. 293. **T**rin. 20 Car. 2. Rot. 719. A Custom, that Lands should descend always to the Heirs Males, (viz.) To the Males in the Collateral Line, excluding Females in the Lineal, was held good. Which it was said was allowed anciently in the Marches of Scotland, in order to the defence of the Realm, which was there most to be looked to; tho' it is said in Davis's Reports, that the Custom of Gavelkind, which was pretended in Ireland and Wales, to divide only between Males, was naught. But the former Custom was adjudged good in this Court, Hill. 18 Car. 2. Rot. 718.

*Foot versus Berkly.*

<sup>Ante 83.</sup> **B**erkly had Judgment in an Ejectment in Communi Banco, and Execution of his Damages and Costs. Foot brings Error, and the Judgment is affirmed. Whereupon Berkley prays his Costs for his Delay and Charges; but could not have them.

For no Costs were in such case at the Common Law, and the Statute of 3 H. 7. c. 10. gives them only where Error is brought in Delay of Execution; so 19 H. 7. c. 20. And here tho' he had not Execution of the Term, yet he had it of his Costs.

<sup>3</sup> Cro. 658. If one hath Judgment in a Formedon in Remainder, and before Execution the Tenant brings Error, the Judgment is affirmed; yet he shall pay no Costs, because none were recoverable at first. 1 Cro.

*Weyman versus Smith.*

<sup>2</sup> Keb. 673. <sup>Raym. 189.</sup> <sup>Post. 180,</sup> <sup>333.</sup> <sup>1</sup> Mod. 63, <sup>81.</sup> **A** Prohibition was prayed to the Mayor and Court of Bristol, suggesting, That a Plaintiff was entered there for 66 l. and that the Cause of Action arose in London, and not at Bristol, and so out of their Jurisdiction.

<sup>1</sup> Sid. 464. <sup>2</sup> Mod. 197. <sup>contra.</sup> Note, An Affidavit was also made thereof, and this is upon Westm. c. 35. and so is F.N.B. 45, unless the party pleading in Bar, or Imparling, admits the Jurisdiction of the Court. 2 last.

*Tarlour and Rous versus Parner.*

<sup>2</sup> Keb. 675, <sup>704.</sup> <sup>1</sup> Mod. 65. **A** Account brought by the Plaintiffs as Churchwardens, against the Defendant the former Churchwarden, for a Bell, &c.

The Defendant pleads, That it lacked mending, and that by the Assent of the Parishioners it was delivered to a Bell-founder, who kept it until he should be paid. To which the Plaintiff demurred.

For this Plea is no Bar of the Accompt, but a good Discharge <sup>1 Mod. 65.</sup> before Auditors. But it was said on the other side, That the Matter pleaded, shewed that the Defendant was never accountable, therefore it might be in Bar. The contrary whereof is adjudged in the same Case in terminis, <sup>1 Rolle 121,</sup> between Methold and Wynne; and so was the Opinion of the Court here.

But then it was alledged, That the Declaration was not good, for there were two Plaintiffs, and yet it is quod reddat ei compotum, and it is de bonis Ecclesiæ, whereas it should have been, bonis Parochianorum.

For the first, the Court said that it should be amended; for it was the default of the Clerk.

But the other was doubtful: For the Precedents were affirmed to be both ways; but they rather inclined, That the Declaration was not good for that Cause.

#### Anonymus.

**A**N Indictment of Forcible Entry in unum Messuagium vel domum Mansional', (quære, if not uncertain) and other Lands and Tenements, tent' ad voluntat' Dom' secundum consuetudinem Manerii, and doth not express what Estate.

For which the Court held, It ought to be quashed; for the Statutes <sup>1 Mod. 71,</sup> 8 H. 6. and R. 2. extend only to freeholds, and the Statute <sup>73.</sup> in King James's time, to Leases for years and Copyholds. And here, tho' he saith, At the Will of the Lord, according to the Custom of the Manor; yet 'tis not sufficient, because he saith not, By Copy of Court-Roll. And it was adjudged in 1653, in this Court, that none of the Statutes extended to Tenants at Will.

#### Martin versus Delboe.

**I**N an Assumpsit the Plaintiff declared, That he was a Merchant, and the Defendant being also a Merchant, was indebted to him in 1300 l. And a Communication being had between them of this Debt, the Defendant promised him in Consideration thereof, That he should have a Share to the Value of his Debt, in a Ship of the Defendant's, which was then bound for the Barbadoes; and that upon the Return of the Ship, he would give him a true Accompt, and pay him his Proportion. And sets forth, That the Ship did go the said Voyage, and returned to London; and that after the Defendant, with some other Owners, had made an Accompt

<sup>1 Lev. 298.</sup>

<sup>1 Sid. 465.</sup>

<sup>1 Mod. 70.</sup>

<sup>2 Keb. 674,</sup>

<sup>696, 717.</sup>



compt of the Merchandize returned in the said Ship, which amounted to 9000 l. and that the Plaintiff's Share thereof came to 1700 l. which he had demanded of the Defendant, and he refused to pay it, &c.

To this the Defendant pleads the Statute of Limitations, and the Plaintiff demurred,

Allegging, That this Action was grounded upon Merchants Accompts, which were excepted out of the Statute. Tho' if an Action be brought for a Debt, upon an Accompt stated between Merchants, the Statute is pleadable, as was adjudged in this Court last Hilary Term, between Webber and Petit; yet here there being no Accompt ever stated between the Plaintiff and Defendant, it is directly within the Statute: And of that Opinion were Keyling and Rainsford.

2 Saun. 124.  
1 Mod. 70,  
269.  
2 Mod. 311.  
2 Keb. 622,  
624.

13 Rep. 33.  
1 Jous 401.  
1 Mod. 296.

But Twisden inclined otherwise, because the Plaintiff declares upon an Accompt stated, and tho' between Strangers, yet he bringing his Action upon it, admits it. Et adjournatur.

Postea 183,  
189.

Nota, Every Parish of Common Right ought to repair the High-ways, and no Agreement with any person whatever can take off this Charge which the Law lays upon them.

Crispe and Jackson *versus* the Mayor and Commonalty of Berwick.

Ante 58.

1 Lev. 252.  
1 Sid. 381;  
462.  
1 Mod. 36.  
Raym. 173.  
2 Keb. 391,  
397, 414,  
602, 676.  
Dev. 58.

**I**N Covenant, after Verdict for the Plaintiff, it was moved in Arrest of Judgment, That there was a Mis-Trial, the Venire being awarded to an adjoining County: Which the Court, after hearing of Arguments in it, ruled it to be well enough; but one of the Plaintiffs died before the Court had delivered their Opinions.

It is prayed notwithstanding that Judgment might be entred, there being no Default in the Plaintiffs, but a delay which came by the act of the Court, and that it was within the Statute of this King, That the death of the Party between Verdict and Judgment should not abate the Action, and that it was in the Discretion of the Court, whether they would take notice of the Death in this case; for the Defendant hath no Day in Court to plead, there being no Continuances entred after the Return of the Postea. 1 Leon. 187. Illey's Case, Latch's Rep. 92. And the Court were of Opinion, That Judgment ought to be entred, and there being no Continuances, it may be entred as if immediately upon the Return of the Postea.

Ante 58.

Lion

*Lion versus Carew.*

**T**HE Case was; A Lease was made to two for 99 years, if three Lives should so long live, and this to commence after the end of a Lease for Life, Reddend' a certain yearly Rent, and two days Work in Harbess, post principium inde, & reddend' inde 3 l. nom' Herioti, post mortem of the Lessees, or either of them, and reddend' two Capons at Christmas, post principium inde. One of the Lessees died before the Lease for Life determined, whereupon the Lessor brings Covenant for the 3 l. and sets forth this Matter in the Declaration.

1 Lev. 294.  
1 Sid. 437.  
2 Saun. 165.  
2 Keb. 50,  
558, 572,  
677.  
1 Sid. 437.

To which the Defendant demurred, supposing that the 3 l. was not to be paid unless the Death had happened after the Term had commenced. And the Court having heard it spoken to divers times by Counsel on both sides, by the Opinion of Twisden, Rainsford and Moreton, Judgment was given for the Defendant.

Ante 9.

For all the other Reservations but this were expressly post principium termini, and Clauses in Companies are to expound one another, as it is said in the Earl of Clanrickard's Case in Hobart. It is in the nature of a Rent and Reservation, which it is not necessary that it should be annual. And in Randall and Scorie's Case, 1 Cro. such a Duty was distrained for, and it shall attend the Reversion, Rolle 457. And he that hath but an interesse termini, is not to pay the Rent reserved; for there is no Term, nor no Reversion, until it commences.

If A. lets to B. for 10 years, and B. redemises to A. for 6 years, to commence in futuro; in the mean time this works no Suspension of either Rent or Condition. The Intention of the Parties is to be taken, That it should not be paid until then. However, Reservations are to be taken most strongly against the Reserver: As Palmer and Prowse's Case, cited in Suffield's Case, 10 Co. is; The Reversion of a Lease for years was granted for Life, reserving certain Rent cum reversione acciderit; a Distress was made for the Rent arrear ever since the Grant.

per and 10 l. of m. a. l.

Resolved, That it was good for no more than was incurred since it fell into possession.

Keyling Chief Justice held strongly to the contrary: For he said the words were so express in this Case, that they have left no place for Construction, which other Clauses or the Intention of the Parties may direct, when the Expression is doubtful. He took it for a Sum in gross; for distrained for it could not be, being reserved upon the Death of the Lessees, or either of them; which was also the Limitation of their Lease: And that Interpretations were not to be made against the plain Sense of Words,



he relied upon Edrich's Case. 5 Co. where the Judges said, They would not make any Construcion against the exprels Letter of the Statute; yet there was much Equity in that Case to incline them to it. And he said, As well as a fine is paid upon the taking of such Lease before it begins, why may not something be paid also when their Interest determines? And in some Countries they call such Payments, a fair Lease.

*Miller versus Ward.*

Walter and  
Chaucer.  
Ante 21.  
2 Keb. 676.

**T**respals for breaking of his Close on the 1st of August, and putting in his Cattel. The Defendant justifies for Common, which he prescribes for in this manner, viz. That two years together he used to have Common there, after the Corn reaped and carried away until it was sown again, and the Third year to have Common for the whole year; and that that Year the Plaintiff declares for the Trespals, was one of the years the Field was sown, & quod post grana messa, &c. he put in his Cattle, absque hoc that he put them in aliter vel alio modo.

The Plaintiff demurs, which it was ruled he might; for the Defendant doth not answer to the Time wherein the Trespals was alledged; and the Traverse will not help it; for aliter vel alio modo doth not refer to the Time.

*Anonymous.*

2 Keb. 679.  
3 Cro. 503.  
Ch. Jult.  
Jones 47.  
Postea 109,  
110.  
1 Cro. 219.  
2 Keb. 679.

**A**n Administrator brings Debt upon an Obligation. The Defendant pleads Payment to himself. Upon which it was found for the Defendant.

Coleman prayed that he might have Costs: As where an Executor brings an Action for Trover and Conversion, in his own time, and found against him; it was ruled in Atkyns's Case. 1 Cro. That he should pay Costs; and here of his own Knowledge he had no cause of Action, the Money being paid to himself.

But the Court resolved, That there ought to be no Costs in this Case; for the Action of Trover in his own time might have been brought in his own Name, so it was needless to name himself Executor or Administrator; but the Action here is merely in Right of the Intestate.

*Harvey versus James.*

1 Keb. 679:

**A**fter Verdict at the Assizes, the Clerk delivered the Postea to the Attorney, by whose negligent keeping it came to be eaten with Rats. But the Court examining the Clerk of Assize, it appeared, That he had entered the Jurors Names, Verdict and

Tales

Tales in his Book, and according to that, the Court suffered the Verdict to be entered on Record.

Anonymus.

**I**n an Action of Battery against Baron and Feme, the Jury find the Feme only Guilty and not the Baron.

It was moved in Arrest of Judgment, That this Verdict was against the Plaintiff; for he ought in this Case to have joined the Baron only for Conformity, and he declaring of a Battery by both, the Baron being acquitted, he hath failed of his Action; and so is Yelverton 106. in Drury and Denny's Case.

2 Cro. 203.  
Cr. Car. 407.  
1 Brow 209.  
2 Mod. 66.  
Postea 328.  
2 Ven. 29.

But here the Court gave Judgment for the Plaintiff, and said, That that in Yelverton was a strange Opinion.

Anonymus.

**A** Certiorari was prayed to remove an Indictment of Manslaughter out of Wales; which the Court at first doubted, whether they might grant, in regard it could not be tried in an English County: But an Indictment might have been found there of in an English County, and that might be tried by 26 H. 8. cap. 6. vid. 1 Cro. Soutley and Price's Case, and Chedley's Case.

1 Mod. Rep. 64, 68.  
2 Keb. 681, 685.  
Latch 12, 18.  
Lit. Rep. 352.  
1 Cro. 247, 248, 331, 332.  
Roll. 294.  
Ch. Just. Jones 155.  
Postea 136, 146.

But it was made appear to the Court, That there was a great cause to suspect Partiality, if the Trial proceeded in Wales; for the Party was bailed already by the Justices of Peace there, (which Twisden said it was doubtful whether they had power to do for Manslaughter.) They awarded a Certiorari, and took Order that the Prosecutor should be bound by Recognizance to prefer an Indictment in the next English County.

Collet *versus* Padwell.

**I**n Debt upon a Bond to perform an Award, which was, That one should make a Lease to another before the 21 of October, which was two or three Months after the Award, and that the other upon the making of the Lease should pay him 50l.

2 Keb. 670.

The Question was, Whether Notice in this Case ought to be given, when he would make the Lease? For otherwise it was said, the other must have 50l. always about him, or be in danger to break the Award.

And it was resolved by the Court, That no Notice was necessary.

Noel



Noell *versus* Nelson.

1 Lev. 286.  
1 Sid. 448.  
2 Saun. 226.  
2 Keb. 606,  
621, 631,  
666, 671.

**M**Ich. 21 Car. 2. Rot. 745. Error to reverse a Judgment given in the Common Pleas, where the Case was thus. Nelson brings Debt against Noell, as Executor of Sir Martin Noell, who pleads plene administravit. The Plaintiff confesseth the Plea, and prayeth Judgment, de bonis Testatoris quæ in futuro ad manus Defendentis devenerint; and upon a Suggestion of Assets afterwards, he had a Scire facias against Noell, and Judgment thereupon.

Noell brings a Writ of Error, and assigned it in this, that the Plaintiff confessing the Plea of Fully Administrated, ought to have been barred.

And it was argued by Winnington for the Plaintiff, and Simpson for the Defendant.

Winnington. Where an Executor pleads falsely or deceitfully, Judgment is to be given against him; as upon ne unques Administer come Executor, Judgment shall be de bonis propriis: But where he pleads truly, it is Reason the Plaintiff should be barred; and the Plaintiff confessing his Plea, it is as strong as if found by a Jury, or rather more; for Verdicts may be false, and therefore Attaints are provided; and such express Confession as here is, is much stronger than an implied Confession sur Demurrer. Indeed if upon plene Administravit Assets are found for part of the Debt, Judgment shall be for the whole, 8 Rep. 134. Shipley's Case, Because the Plea was false: But if an Executor should be liable to be sued, and have Judgment given against him when he had fully administrated, it would put a great Inconvenience upon him, as to be put to Charge to defend the Suit, and to be in Misericordia.

And whereas it was objected, That if the Plaintiff should be barred in such Case, he would yet have no Advantage by commencing his Suit, of having his Debt paid before other Debts in pari gradu; he answered, This Inconvenience is not to be matched with that, that the Executor should be liable to; besides, the Law will ever favour the Executor; for if an Executor be sued and the Plaintiff nonsuit, he shall have Costs, but an Executor Plaintiff shall pay no Costs upon a Nonsuit. 3 Cro. 503. vid. Hob. 83. Lawney's Case. Also a Man may be presumed to know whether an Executor hath Assets or no; for he may consult the Inventory.

And for the Cases that might be objected, as that of the Warrantia Chartæ against an Heir, who pleads Riens per descent, or that the Plaintiff is not impleaded, the Plaintiff may pray Judgment presently. F. N. B. 134.

He answered, 'Tis true, the Writ may be brought *quia timet*, for he may be after impleaded in an Action wherein he cannot vouch; yet if he be after impleaded in a *Præcipe* he must vouch, and this is a line real, and the Heir merely in *loco patris*; whereas, when an Executor hath fully administered, the Executorship is as it were determined. And for the Case where Debt is brought against the Heir, who pleads *riens per descent*; the Plaintiff may pray Judgment presently, to have Execution of Assets, as shall afterwards descend, he said he knew no particular Authority where it was so done; but if it be so as it is said in Shipley's Case, yet not to be resembled to this Case; for the Heir is charged as for his own Debt, and the Action is in the *Debet & Detinet*, Com. 443. and if the Heir pleads *riens per descent*, and found against him, the Judgment is general, and so of an Executor; so where the Judgment is *sur nihil dicit*, Moor 522. Dyer 81, 344. 2 Rolle 67. 3 Cro. 692. Tit. Heir; so where he confesses the Action; but if an Executor after pleading *Plene Administravit* confesses the Action, the Judgment shall be *de bonis Testatoris*. Hob. 178. And for the Opinion in Shipley's Case, 8 Rep. which is according to the Judgment here, he said it was *obiter*; but he relied upon Cro. Dorchester and Webb's Case, where that Opinion is denied, and it is said there, that all the Precedents are, that the Plaintiff is in such case to be barred. Rastal's Entries, 323, 324.

Simpson contra. The nature of the Plea is to be considered, it doth not deny the Cause of Action, but goes only to take away the present effect of it; *remoto impedimento resurgit Actio vel Executio*. 34 H. 6. 23. Prifot saith, If an Executor pleads *ne unques Executor*, and it is found against him, Judgment is to be *de bonis propriis*. But otherwise if he pleads *Plene Administravit*, for then he doth not put the Party from his Action for ever. He said the Case of the Action of Debt against the Heir was the same, for he is bound only by reason of the Land descended. 1 Rolle 929. If an Executor pleads *Plene Administravit*, and the Plaintiff takes Issue, and it is found against him, he is to be barred, for he (as the Book saith) hath waived his advantage; he cited also the Book of the Office of Executors, (supposed to be written by Doderidge) lib. 7. c. 15. and relied principally upon Shipley's Case, 8 Co. 134. which is cited and allowed in Hob. 199. and upon a Precedent in this Court, Trin. 13. Jac. Rot. 1104. between Perryman and Westwood, where Judgment was just as in this Case, and Mich. after Rot. 206. upon Suggestion of Assets, a *Scire facias* was taken out, and Issue taken and tried at Guild-hall, before my Lord Coke; where Assets were found for part, and Judgment to recover so much, and the Residue if Assets should come after; which as to the latter Judgment, was somewhat further than the principal Case.



This Judgment was afterwards affirmed in Parliament upon a Writ of Error there.

2 Saun. 226, 227.

5 Co. 87.

8 Co. 17. b.

V. Hutton 128. the Case reported without any such Opinion.

2 Saun. 227.

Keyling, Rainsford and Moreton held clearly, That Judgment ought to be affirmed, chiefly for the great inconvenience it would be to one that had commenced an Action, and yet his Debt should have no Preference before others of the same sort; and many times the Testator leaves a great Estate in Bonds and Specialties, which yet are no Assets until the Money is paid: Whereas the Case of the Heir is much stronger, in regard of the improbability of his having Assets in futuro.

In 16 H. 7. 10. it is said, If an Executor pleads Plene Administravit, it is but a temporal Bar. A Rent is granted in Fee, provided that it shall cease during the Minority of the Heir, the Wife brings Dowry, the Heir being under Age, she shall have Judgment sed cesset Executio.

Twisden stuck much to the Authority of Dorchester and Webb's Case, but at length consented, that Judgment should be affirmed.

Note, The Judgment was in Misericordia, and the Court doubted at first, whether it were not erroneous for that Cause? But it appeared that the Executor did not come in primo die, wherefore notwithstanding they affirmed the Judgment.

## Termino Sancti Michaelis Anno 22 Car. II. In Banco Regis.

*Prydyerd versus Thomas.*

Raym. 189.  
1 Lev. 466.  
2 Keb. 654.

A Writ of Error was brought upon two Judgments, given in an inferiour Court, and they returned two Records between the same Parties, but it seems not those which the Plaintiff intended, and this was complained of to the Court; and it appeared, That those which the Plaintiff brought his Writ of Error upon, were not determined; for Writs of Enquiry of Damages were returned, but no Judgments entred.

Curia. If there be divers Records between the same Parties, the inferiour Court may remove which they please, they being warranted by the Writ so to do; and if Judgment be given after the Teste, and before the Return of the Writ of Error, the Record shall be removed; but if Judgment be entred after the Writ is returnable, the Writ is only to be returned, and that no Judgment is yet given; and here was an Omission in the Plaintiff, that he did not see that Judgment was entred; for after a Writ of Enquiry of Damages returned, the Court is to give Judgment at the Prayer of either Party, and not without.

Note, If the Record vary from the Writ of Error, yet the inferior Court ought to remove it.

The King *versus* Ledgingham.

**I**N an Information against him for the King, the Court took a *privy Verdict*, and so it was said was the usual Course at the Assizes. But it cannot be so in case of Felony and Treason, as is said in the 1 Inst. 227. b. Postea 104.  
Raym. 193.  
2 Keb. 687,  
697.

In cases of Life and Member, if the Jury cannot agree before the Judges depart, they are to be carried in Carts after them; so they may give their *Verdict* out of the County. 1 Mod. 71,  
288.  
1 Lev. 299.

Polus *versus* Henstock.

**I**N Trespafs for impounding of 11 Oxen. The Defendant pleads, That Sir H. Vernon was seized of a Close called the Cowes-Lefowe in Fee, and let it to him for 99 Years; and that the Cattel came upon the Close, and so justifies for Damage feasant. Raym. 192.  
2 Keb. 686,  
707.

The Plaintiff replies, confessing Sir H. V's. Estate and the Lease, and saith, That Sir H. V. was seized of another Close adjoining, called Brown's Close, and alledges a Custom in Peplow, (in which Town both the Closes are;) That all the Occupiers of the Cowes-Lefowe had maintained a Fence against Bowmers, and that the Cattel came upon the Land in default of a Fence, &c. and Issue taken upon the Custom, and found for the Plaintiff.

It was moved in Arrest of Judgment; First, That this was in the nature of a Prescription, and not of a Custom; for a Custom cannot be laid in a Will, and applied to a particular place, or Inhabitant therein, unless in case of a Copyholder; where it is necessary, in regard he cannot prescribe. 4 Co. 113.

Secondly, If it had been alledged by way of Prescription, it should be laid in him that had the Inheritance. And if it be objected, that it is hard to drive a Stranger to discover that; then it ought to be alledged quod omnes Tenentes; but not as it is here, omnes Occupatores. 1 Cro. Baker and Brereman's Case.

Thirdly, By the Unity this Duty of Fencing is extinguished, and shall not revive though the Closes come after into several Hands. In Dyer 295. b. it is left a Quare. But in Popham 172, it is clearly held so, where it is said, Things of necessity shall revive, as a Way to Market or Church; but not so of Easements. Hob. 131.  
contra.

1 Cro. Baker and Brereman's Case.

And of this Opinion were the Court.



Jones *versus* Powell.

1 Lev. 297.  
Raym. 196.  
2 Keb. 710.  
1 Mod. 272.  
contra.

**T**he Plaintiff declared, That he was an Attorney, and the Defendant to scandalize him in his Profession said of him, That he could not read a Declaration; By reason of which many of his Clients left him. And the Opinion of the Court inclined against the Plaintiff.

For the Allegation of special Damages will not maintain the Action, unless the Words import some Slander, which these did not, unless brought in by some Words precedent, touching his Knowledge in his Profession; for the Declaration might be so written, that he might not be able to read it, without any Imputation of Ignorance.

Sard *versus* Ford.

1 Lev. 296.  
1 Mod. 69.  
2 Saun. 172.  
Raym. 195.  
2 Keb. 689,  
706.

**M**ich. 21. Car. 2. In an Action upon the Case the Plaintiff declared, That he was seized of the Manor of Newton-Abbot, and that he, &c. had kept a Market there every Wednesday, and used to have the profits of Stallage, &c.

That the Defendant had erected a new Market, at a place 7 miles distant from the Plaintiff's, held every Tuesday, &c.

Jones excepted to this Declaration, For that it could not be to the Hindrance of the Plaintiff's Market which was 7 miles off, and kept upon another day. 22 H. 6. 14. 2 Roll. 140. It appears that an Action was brought against one that levied a Market not above 5 miles distant, and upon the same day.

Curia contra. The Writ of ad quod damnum doth not express the Market to be erected the same day, and notwithstanding it will hinder Recourse to the other Market.

## Anonymus.

1 Lev. 308.  
Raym. 194.  
2 Saun. 302,  
303.  
2 Keb. 688,  
727, 737,  
775.

**A** Dean and Chapter made a Lease of Tithes for Years; the Lessee assigned over his Interest, and afterwards the Dean and Chapter bring Debt against him for the Rent: Who pleads, That the Plaintiffs accepted the Rent, due since the Assignment from the Assignee, to which the Plaintiffs demur.

Jones. This is no Rent, but a meer Sum in gross due upon the Contract, therefore in the 5 Rep. in Jewell's Case it appears, That such a Rent cannot go to the Successor of a Bishop, for the Successor of a Sole Corporation cannot sue upon a Personal Contract to his Predecessor.

If the Reversion be granted over, the Grantee cannot bring Debt, 2 Roll. 447, 451. 1 Inst. 47. a. By the same Reason the Assignee of the Lease is not liable.

Again, The Acceptance is not well pleaded, for it is only Acceptaverunt. Whereas a Corporation aggregate cannot accept but by Bailiff, and an Acquittance must be given.

Saunders contra. This is not a meer Sum in gross, but in the nature of a Rent, as is held in Valentine and Denton's Case, 2 Cro. 111. If it were a Sum in gross, no Action could be brought until all the days of Payment were incurred, 2 Inst. as upon a Bond to pay Money at several days.

Also the pleading of Acceptaverunt is good; for it being such a Corporation as can accept, necessary circumstances are ever implied, as Liberty in a Feoffment; such a Corporation in an Assumpsit shall declare of a Promise made to them, which yet must be by means of their Bailiff or Attorney.

The Court held this last Matter to be most doubtful. And Twisden and Rainsford said it might be questioned, whether after Acceptance of the Assignee, the Lessor might not resort to his Lessee for his Rent? It is delivered in Walker's Case thus, fuit dit, not as a Resolution, 3 Co. At adjournatur.

*Catterel versus Marshal.*

**E**rror to reverse a Judgment in an Assumpsit, brought by Marshal in the Common Pleas; wherein he declared, That he being sued in the King's Bench, retained Catterel for his Attorney; who in Consideration of 30 s. given him, and that he would enter into a Bond with sufficient Penalty to save him harmless, promised to get Bail filed for him; and avers that he did give him Bond with a great and sufficient Penalty, &c. The Defendant pleads Non Assumpsit, and found for the Plaintiff, and he had his Judgment.

2 Keb. 692.

1 Mod. 70.

1 Lev. 297.

Now it was assigned for Error, that he did not express of what Penalty the Bond was, that it might appear to the Court to be sufficient; as if one abow for a Distress upon a Copyholder for a reasonable Fine, the value of the Land must be set forth, and the certainty of the Fine, that the Court may judge of it. Austin and Gervase's Case, Hob. 69, 77. In Consideration that he should give him Bond for 10 l. the Defendant promised, &c. and pleads, That he offered him Bond for the said Sum, &c. and upon Issue non Assumpsit, it was found for the Plaintiff. But he could not have Judgment, because the Sum wherein he offered to become bound was not expressed, so that it might appear to the Court to be sufficient.

Jones contra. This differs from the Case in Hob. for there the Sum being certain for which the Bond was to be given, the Court may well judge what Penalty will secure it. But it is not so in this Case, for it doth not appear to what value the damni-



cation may be; so there is nothing, as in the other Case, whereunto to proportion the Penalty of the Bond.

The Court held, That it would not have been good upon a Demurrer; but being after a Verdict, and the Statute of Jeofails made at Oxford, (which Twisden styled an omnipotent Act) they gave Judgment for the Plaintiff.

#### Lord Biron's Case.

**T**he Lord Biron was Plaintiff in an Action, and upon a Nonsuit five pounds Costs were taxed against him, and he brought another Action for the same matter, which was said to be merely for Averation; and that he refused to pay the Costs; neither could he be compelled being a Peer, and in Parliament-time.

Wherefore the Court gave day to shew Cause, why this Action should not stay until he had paid the Costs in the former.

#### Anonymus.

**I**f a Writ of Error be brought in the Exchequer Chamber, and that being discontinued, another is brought in Parliament; this second Writ is a Superfedeas. But if a Writ of Error be brought in Parliament, and that abates, and the Plaintiff brings a second; this is no Superfedeas, because it is in the same Court.

1 Mod. 285.  
Ante 31.  
Postea 266.  
2 Cr. 241,  
242.

#### Prior *versus* Shears.

**I**n a Writ of Error to reverse a Judgment given in the Palace-Court in an Assumpsit, where the Plaintiff declared *sur indebtedness pro Naulo*, and upon Non Assumpsit, &c. had Judgment.

It was assigned for Error, That it was not ascertained how the Defendant was indebted; and that freight was usually contracted for by Charter-Party, and if so, the general *Indebitatus* would not lie for a Debt by Specialty.

Notwithstanding the Judgment was affirmed; for, for ought appears, there was not any Deed in the Case; and it shall not be intended; and it is no more than the Common Action, *pro mercimoniis habitis & venditis*.

Note, It was further objected, That this appears to be for Mariners Wages for Sailing to some Foreign parts, which must needs be out of the Jurisdiction of the Marshalsea, and though the Agreement were made within it, yet the thing being to be done elsewhere, they could not hold Plea; As if a Carrier should agree within the Limits of the Court, to carry Goods from thence to York; no Action could be brought there upon it; which was agreed.

De ut

But the Court said here, It doth not appear they were to sell to any place out of the Jurisdiction, and they have laid all the Matter to be *infra Jurisdictionem Curiae*. And therefore the Judgment was affirmed.

Hayman *versus* Trewant.

**T**Rin. 22. Car. 2. Rot. 710. In an Action upon the Case, for that the Defendant bargained with him such a day and year for the Corn growing upon such Ground, affirming it to be his own, whereas he knew it to be the Corn of J. S. and *postea* adtunc & *ibid.* *fraudulenter vendidit & warrant*, &c. Raym. 199.  
1 Mod. 72.  
2 Keb. 692.

The Defendant pleads, That the Plaintiff had another such Action depending for the same Cause, and demands Judgment of the Writ.

The Plaintiff replies, That that Action was commenced for another Cause, and not for the same; *absque hoc*, that it was for the same Cause. To which the Defendant demurs specially; because the Plaintiff having denied what the Defendant affirmed, ought not to have added a Traverse, but to have concluded to the Country: as the Case of Harris and Phillips, 3 Cro. 755. was adjudged, where in an *Audita Querela*, to avoid the Execution of a Recognizance, the Plaintiff sets forth, that it was defeazanced upon payment of divers Sums of Money at certain days; and that he was at the place appointed, and tendered the Money, and that the Defendant was not there to receive it. The Defendant pleaded *Protestando*, That the Plaintiff was not there to pay it, and that he was there ready to receive it; *absque hoc*, that the Plaintiff was ready to pay it.

Which being specially demurred to, the Court held the Plea naught, and that there being an express Affirmative and Negative, there should have been no Traverse; for so they may traverse one upon another in infinitum.

Notwithstanding the Traverse was here held good, which was allowed for putting the Matter more singly in Issue: And it appears that Phillips's Case was adjudged upon another matter; for that the Plea in Bar was not entered as the Defendant's Plea, but was entered thus: *Pro placito* Bush, a Stranger, *dicat*. Yelv. 38.

Then it was moved, That (as the Plaintiff hath declared here) it appears, that the Warranty was subsequent to the Bargain: For it is said, that he bargained for the Corn, knowing it to be the Corn of J. S. *postea* adtunc & *ibidem* vendidit, which is repugnant. Sed non allocatur; for where is it said first, That he bargained, that shall be intended a Communication only, and the Consummation of it after, when the Warranty was given, which is also said to be adtunc & *ibidem*. So alledged well enough.

Foxwith



Foxwith *versus* Tremaine.

Ante 40, 54.  
2 Saun. 212,  
213.  
1 Sid. 449.  
1 Mod. 47,  
72, 269.  
Raym. 198.  
2 Keb. 537,  
---&c.  
1 Lev. 299.

**T**Rin. 21 Car. 2. Rot. 1512. Five Executors bring an Action sur Indebitat' Assumpsit. The Defendant pleads in Abatement, That two of them are under the Age of 17. and that they appeared by Attorney. And to this the Plaintiffs demurr.

They who argued for the Defendant made two Questions :

1. Whether they ought all to join in the Action ? And it was said, they ought not ; for one under Age cannot prove the Will. And in Smyth and Smyth's Case, Yelv. 130. it is resolved, They must be all named, so that their Interest may be reserved unto them ; but are not to be made Parties to the Action. And for this the Case between Hatton and Mascue, which was adjudged in the Exchequer-Chamber, was cited : Where in a Scire facias it was set forth, That A. being the Executor of B. made his Will thus :

I Devise all my Personal Estate to my two Daughters and my Wife, whom I make my Executrix : And that they had declared in the Ecclesiastical Court, that this made them all three his Executrices, and that the Will was proved ; and that the Wife brought this Scire facias, to have Execution of a Judgment obtained by A. the Testator. And the Defendant demurred, because not brought in all their Names ; and it was resolved in the King's Bench that the Action was well brought, and affirmed upon a Writ of Error in the Exchequer-Chamber : But if in the Case at Bar they ought to join, they must appear by Guardian.

It having depended divers Terms, It was now resolved by Rainsford and Moreton, That the Action was well brought : and they relied upon the Case in Yelverton ; and they said, the Case of Hatton and Mascue was no Authority against it, for there they were named ; and where some are of Age, no Administration durante minori etate is to be granted.

They held also, That the Appearance ought to be by Attorney, because they join with others ; and so in autre droit ; and so is 3 Cro. 377. the Countess of Rutland's Case, and 541. Resolved, that an Infant Administrator shall sue by Attorney. See 1 Roll. 288. and 2 Cro. 420, & 421. Cotton and Westcote's Case. The difference is taken where an Infant Executor is Defendant, and where Plaintiff, and Judgment given for him ; in which last Case only the Appearance by Attorney is said to be good.

Twisden contra. An Infant cannot in any wise sue or defend by Attorney ;

First, Because he cannot make an Attorney ;

Secondly, If it should be allowed, he might be amerced pro falso clamore, and no way to avoid it but by bringing a Writ of Error.

Thirdly,

Thirdly, He might be injured by the Attorney's Plea, and could not remedy himself, as he may against his Guardian; as if in Debt the Defendant should plead a Release, and the Attorney confesseth it. And he cited a Case in this Court, Mich. 1649. between Colt and Sherwood, Where an Administrator brought an Action, and it appeared by the Record, that he was above 17; yet it was ruled that he ought to sue by Guardian: For tho' by the Civil Law he was of Age to undertake the Administration; yet the manner of his Suing was to be determined by our Law, and that could not be by Attorney until the age of 21.

Another Case he cited between Peyton and Dorce, adjudged in this Court upon a Writ of Error out of the Petit Bag; where Peyton sued as Administrator, and the Entry was Quod queritur, and did not express, whether per Attornat', Guardianum, or how; and had Judgment; and Error was brought in this Court, and these four Points were resolved:

First, That a Writ of Error did lie out of the Petit Bag into this Court, upon an Error in Fact.

Secondly, That the Entry being general, it should be taken that the Appearance was in propria persona.

Thirdly, That the Plaintiff being an Infant, tho' an Administrator, could not sue or appear, but by Guardian or Prochein amy.

Fourthly, That the Statute of Jeofails did not aid this Case, which expresses only the Defendant's appearing by Attorney.

As to the other Point, He inclined that the Action brought by them all was well enough: But he acknowledged that much might be urged against the Case of Hatton and Mascue; for the naming of them could signifie nothing, not being made Parties to the Action. But he was not so much swayed by that Authority, because he held, That the Cause did not come well into the Exchequer-Chamber, being a Scire facias, upon which he said no Writ of Error lay thither, tho' upon a Judgment, no more than upon a Recognizance, and said, They did join here, as it were, for Conformity. As if a Feme Infant be made Executrix, and marries, the Administration durante minori etate ceases, tho' she be under 17, and she and her Husband shall sue.

The Chief Justice was absent, being sick; and so the Plaintiff had Judgment by the Opinion of Rainsford and Moreton.

Ward *versus* Rich.

Ward brought an Action against Hatton Rich de uxore abducta, and keeping of her from him, usque such a day, which was some time after the Exhibiting of the Bill, and concluded contra formam Statuti.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment,



ment, and the Declaration was held good notwithstanding the impertinent Conclusion of contra formam Statuti, there being no Statute in the Case.

Secondly, The Court resolved, That Judgment should be stayed; for the Jury shall be intended to give Damages for the whole time mentioned in the Declaration: As in Trespass, with a Continuando to a day after the Writ brought, the Plaintiff shall not have Judgment after Verdict, which gives Damages by Intendment for the whole time declared for.

And Twisden said, These two Cases were resolved: A Tradesman brought an Action in an Inferiour Court, for slandering of him in his Trade, by which he lost his Custom within the Jurisdiction of that Court & alibi, and it was held maintainable notwithstanding the alibi.

The other was an Action brought upon the Sale of several things for divers Sums of Money, quæ quidem pecuniarum summæ attingunt ad 10 l. whereas rightly computed they came but to 9 l. The Jury gave Damages less than 9 l. and it was held good: But if the Verdict had been for 10 l. it had been naught.

The King *versus* Ledgingham.

Ante 97.  
Raym. 193,  
205.  
2 Mod. 71,  
288.  
1 Mod. 71.  
288.  
1 Lev. 299.

**A**N Information was brought against Ledgingham, for that he being a man of an unquiet Spirit, communis perturbator & oppressor vicinorum & tenentium, had taken excessive Distresses of divers of his Tenants.

After Verdict for the King at the Assizes, it was said, That no Judgment could be given upon this Information, which was said to be defective both in Matter and Form.

It hath been often ruled, That Communis oppressor, or such like general Words, without particularising Offences, was insufficient in an Indictment or Information, unless the word Communis Barredator, which is of known signification in Law, and comprehends divers Crimes; and Twisden said, is as much as Common Knave, 9 Ass. 2. Communis latro, not good: Vid. Roll. 79. Moor 451. Neither can an Information be exhibited for taking of excessive Distresses; for that was not punishable until the Statute of Marlebridge, cap. 4. which saith, That he that so distrains shall be amerced, whereas upon an Information he must of necessity be fined. 2 Inst. 107.

Again, It ought to have been expressed upon what Tenants the Distresses were taken, with their Names, otherwise it is too incertain. One was indicted, for that he serving upon such a Grand Enquest, did reveal the Secrets of the King and himself. It was resolved to be ill, because not expressed what Secrets. Moor 451. and of this Opinion was the Court in omnibus. Ante 97.

Pierfon

*Pierſon verſus Ridge.*

**I**N Replevin, the Defendant made Conuſance as Bailiff to a Lord of a Manor, who had a Court Leet by Preſcription, and laid a Custom for ſuch a Townſhip to ſend one to be ſworn Conſtable there, which not being done, a fine was ſet, and this Diſtreſs taken for it. Upon which it was demurred; Becauſe no Custom was alledged to warrant the Diſtreſs: For tho' of common Right a Diſtreſs may be taken for a fine in a Court Leet, that is, where it is impoſed for ſuch things as are of common Right incident to its Jurisdiction, as for Contempts, or the like: Yet where Custom only enables them to ſet a fine, it cannot be diſtrained for without Custom alſo. 11 Co. Godfrey's Caſe: And to this Opinion did the Court incline. Sed adjournatur.

Raym. 204.  
2 Keb. 701,  
739, 745.

*Anonymus.*

**T**WO Actions of Accompt were removed into this Court by Habeas Corpus, and Special Bail put in. And it was moved, That the Bail might be diſcharged, and Common Bail filed; becauſe in an Accompt, Special Bail is not to be put in. But it was ſaid, That the Plaintiff had declared in one in an Action upon the Caſe, and ſo prayed that the Bail might ſtand quoad that. But it was ruled, That the Bail ſhould be diſcharged; and if the Plaintiff would have Special Bail, he muſt arreſt the Defendant again in an Action upon the Caſe.

1 Lev. 300.  
2 Keb. 713.

*Doctor Lee's Caſe.*

**D**OCTOR Lee having Lands within the Lebel, was made an Expenditor by the Commiſſioners of Sewers; whereupon he prayed his Writ of Privilege in this Court; and it was granted. For the Register is, Vir militans Deo non implicetur ſecularibus negotiis; and the ancient Law is, Quod Clerici non ponantur in Officia. F. N. B. Clergy-men are not to ſerve in the Wars.

1 Mod. 282.  
1 Lev. 303.

*Jemey verſus Norris.*

**E**rror to reverſe a Judgment in an Aſſumpſit, upon a Quantum meruit for divers things ſold.

1 Mod. 295.  
2 Keb. 715.

It was aſſigned for Error, That the Declaration amongſt the reſt was for unum par Chirothecarum, and did not expreſs what ſort of Gloves they were, which are of much different Prices, according to the different Leather they are made of. And Playter's Caſe, 5 Co. was cited, where Treſpaſs for taking of his Fiſhes was held

1 Lev. 303.



not good, because not ascertained of what kind : Sed non allocatur.

Another of the things declared for was una parcella feli, which (as it was said) was utterly uncertain; and that was held to be naught. Tho' it was said, an Action was brought for taking away unum cumulum Fœni, Anglice, a Rick of Hay, and not alledged how much it contained; yet held good. But in Webb and Washburn's Case an Action was brought for a Pair of Hangings, and it was adjudged against the Plaintiff, for the Incertainty.

1 Mod. Rep.  
287.

Jones contra; and cited a Case in this Court 24 Car. 1. Green and Green, in Trover for six parcels of Lead, and notwithstanding the Incertainty the Plaintiff had Judgment. So in Trover for a Trunk de diversis Vestimentis, and did not say what Garments; and yet held good. But admitting it should not be good in Trover, yet it is well in this Action. 'Tis the common Course to declare sur Indebitatus pro mercimoniis, and never express what they are.

And the Court were of Opinion, That the Plaintiff was to have Judgment; for it is an Action much of the same nature with an Indebitatus.

And Twisden said, Where the Promise is to pay Quantum meruit, he knew not why the Plaintiff might not declare upon an Indebitatus in a certain Sum, and that he might prove the Value upon the Evidence; and if such a Case came to be tried before him, he would have a Special Verdict found in it.

The Court said, Such an uncertain Declaration would hardly be good in Trover or Replevin, and held the Case of the six Parcels to be strange; and for the Trunk, that an Action lies; for that the things contained in it were alledged but as matter of Aggravation of Damages.

2 Saun. 74.  
2 Sid. 174.  
175.  
Ante 71.  
Postea 114.

Vid. the Case of Taylour and Wells, ante: Trover de decem paribus velorum & regularum, Anglice, Ten Pair of Curtains and Gallance.

Wilson versus Armorer.

Ante 78, 79.  
87.

1 Lev. 287.  
2 Keb. 642,  
643, 667,  
719.

**I**n Debt against the Heir, and Riens per discent pleaded, the Case upon Special Verdict was thus: The Ancestor made a Feoffment of a Manor to divers uses, excepting two Closes for the Life of the Feoffor only; and whether those two Closes did descend, was the Point referred to the Judgment of the Court.

And it was adjudged, That they did descend, either for that the Exception was good; tho' the latter part of the Sentence, (viz) for the Life of the Feoffor only, was void, and therefore to be rejected; or, if the whole Exception was void, because one entire Sentence.

Pet

Yet they all agreed, that there was no Use limited of those two Closes which were intended to be excepted; for the Use was limited of the Manor exceptis præexceptis, which excluded the two Acres: for altho' there were not sufficient Words to except them, yet there was enough to declare the Intention of the Feoffor to be so. <sup>Ante 78, 87.</sup>

Anonymus.

A Judgment for erecting of a Cottage for Habitation, contra Statut' 31 Eliz. cap 7. was quashed, because it was not said that any had inhabited in it; for 'tis no Offence before; per Rainsford & Moreton, ceteris absentibus. <sup>1 Mod. 295. 2 Keb. 705.</sup>

## Termino Sancti Hillarii, Anno 22 & 23 Car. II.

### In Banco Regis.

Robson's Case.

A Prohibition was prayed to a Suit for Tithes by the Parson, upon a Suggestion of a Modus paid to the Vicar, and that the Vicaridge had time out of mind been endowed. <sup>2 Keb. 719, 729.</sup>

Coleman moved for a Consultation, because the Endowment of the Vicaridge was not proved by two Witnesses within six Months, according to the Statute.

But it was denied; for that part of the Suggestion is not to be proved by Witnesses, but only the Payment of the Modus. And it was said, If the Suggestion consisted of two parts, it was sufficient to produce one Witness to the one, and another to the other. <sup>Ante 61.</sup>

Dacon's Case.

Dacon was presented in the Court Leet for refusing the Office of Constable, and fined. <sup>2 Saun. 290.</sup>

It was moved to quash it, because it expressed the Court to be held infra unum mensem Sancti Michael' (viz.) 12 November, and so the Day shewn above a Month after Michaelmas. And it is necessary to set down the precise Day, for it may else be upon a Sunday, and yet within a Month after Michaelmas; and for this cause the Court held, that it must be quashed. <sup>2 Keb. 731.</sup>



## Error.

**A**n Outlawry was reversed, for that the Proclamations were returned to be ad Comitatu' mensur' apud such a place in Com' pradiet', and not said, pro Comitatu: For anciently one Sheriff had two or three Counties, and might hold the Court in one County for another.

Calthorpe *versus* . . . . .

2 Keb. 734.

**I**n Debt for Rent, the Plaintiff declared, That he let the Defendant such Land, anno 16 of the King quamdiu ambabus partibus placeret; and that anno 16 the Defendant entered, and occupied it pro uno anno tunc proxime sequent'; and because the Rent was behind pro pradiet' anno finit' 18. he brought the Action. Upon which it was demurred,

Because the Rent is demanded for the Year ending 18. and it is not shewn that the Defendant enjoyed the Land longer than anno 17. And in Debt for Rent upon a Lease at Will, Occupation of the Tenant must be averred.

To which it was answered,

That it is said, Pro pradieto anno, which refers to the Year mentioned before, which was next following the Lease, and it might be said finit' anno 18. for so it was ended then, or at any time after.

And the Court said, It would be clearly good after a Verdict: But being upon a Demurrer they would advise.

## Anonymus.

**A**n Indictment for not performing of an Order of the Justices of the Peace, concerning a Bastard Child.

It was moved to quash it, because it did not conclude contra pacem. But it was held, that ought not to be, it being but for a Non-feasance.

Postea 111.

An Indictment of forcible Entry was quashed, because it alleged the Party to be seised and possessed, and so uncertain which.

Mohnington *versus* William.

1 Lev. 308.

2 Keb. 693,

739.

Raym. 200.

**I**n a Replevin the Defendant avowed for a Rent charge, and set forth, That the Plaintiff granted a Rent to J. S. in fee, who granted, bargained and sold it una cum arreragiis to him, and shewed the Indenture to be inrolled within six Months, virtute cujus, and

and the Statute of Uses, he was seised, and for a year's Rent since the Assignment adowed.

The Plaintiff replies, and traverses the Grant of J. S. prout, and found for the Adowant, and moved in Arrest of Judgment by Jones.

First, That here is an impossible Issue, which comprehends as well the Grant of the Arrears (which cannot be) as the Rent.

Secondly, He intitles himself by Bargain and Sale, and the Statute of Uses, and doth not shew that it was in Consideration of Money; and otherwise the Rent cannot pass without Attornment 3 Cro. 166.

But the Court gave Judgment for the Adowant.

As to the first, The pleading the Arrears to be granted is altogether void, and does no harm, in regard the Adowry is expressly for Rent Arrear after the Grant.

And for the second, The Court held the pleading good after a Verdict; and it shall be intended, that Evidence was given of Money paid. As a Grant of a Reversion pleaded, without Attornment; or a Grant of a Rent, and not expressed to be by Deed; yet a Verdict will help those defects. Harton's Rep. 54.

Note, Twisden said, Where a Man in pleading sets forth his Title by a Conveyance, in which are the words Give, Grant, Release, Confirm, Bargain, Sell, &c. he must express to which of them he will use it.

*Adams versus Guy.*

**E**RROr to reverse a Judgment given in the Court at Bristol, in Debt against the Defendant as Executor to J. S. who declared upon a Mutuasset of him so much, because Debt lies not against an Executor upon a simple Contract. <sup>2 Saun. 291.</sup> <sup>2 Keb. 746.</sup>

Sed non allocatur, He agreeing to the Action, and suffering Judgment to pass against him. <sup>1 Sid. 333.</sup>

Secondly, That he set forth, that the Testator Mutuasset, which properly signifies to lend and not to borrow, and it ought to have been Mutuatus esset.

But the Court affirmed the Judgment; and held, that either might be expounded to borrow.

*Anonymus.*

**A**N Administrator brought Trover and Conversion, and declared, That the Intestate at the time of his Death was possessed of divers Goods, and that after his Death, and before Administration committed, they came to the Defendant's hands, who converted them. <sup>3 Lev. 60.</sup> <sup>2 Keb. 738.</sup>

Upon



Ante 92.

Upon Not Guilty it was found for the Defendant, and prayed that he might have Costs; and the Court held that he ought to have them, the Conversion being since the Death of the Intestate.

## Sir Thomas Pettus's Case.

2 Keb. 415,  
705.

**I**T was moved to quash an Indictment of Manslaughter against him, for that it is said to be taken coram Coronatoribus Comitatus & Civitatis Norwici, at Buckthorp in the County of the City, per Juramentum hominum de Civitate Norwici;

Whereas the Jury ought to have come from the County and City of Norwich, for they shall not be intended to be co-existent, especially in an Indictment.

As if the Caption of an Indictment be at Dale, and the Jury come de Parochia de Dale, it is good cause to quash it; yet in an Action they should be intended the same: So it is sufficient to put the County in the Margin of the Declaration in an Action, but not so in an Indictment. 1 Cro.

Again, By the Statute de Coronatoribus, the Jury ought to come from the four next Wills.

Of the first Exception the Court doubted.

But to the second Twisden said, It need not be returned upon the Indictment, that the Jury came from the four next Wills.

But they would not quash the Indictment upon Motion, for they said it was not their course to do so in case of Manslaughter; but ruled the Party to plead to it, tho' it was shewn he had been tried at the Assizes upon an Indictment of Murder, for the same Killing, and found Guilty of Manslaughter.

The King *versus* Clapham.1 Lev. 306.  
2 Keb. 738.  
742.

**A**Mandamus was prayed to the Lord President and Council of the Marches, to admit Clapham to the Exercise of the Office of Deputy Secretary.

And it was returned quod tempore receptionis brevis non fuit constitutus Deputatus.

It was said, That one which claimed to be Deputy, his Authority being revocable, could not pray a Mandamus.

But to that it was answered, That the Mandamus was at the Suit of Mr. Win; and it set forth how he had the Office of Secretary, exercend' per se vel sufficientem Deputatum suum; and that they had refused this Clapham, whom he had appointed his Deputy.

And it was resolved, That the Mandamus was well awarded, for he had no other remedy to have his Deputy admitted. And whereas it was said, being an Officer belonging to the Court, they are to judge of his Sufficiency, and so have power to refuse him; It was answered to, and so resolved, That then they ought to have returned, that he was insufficient.

And it was also resolved by all the Court, That the Return being, that non fuit tempore receptionis brevis Deputatus constitutus, was naught; for if he were made his Deputy before, the Return was true, unless he made him his Deputy at the very instant of the Receipt of the Writ; and Returns must be certain, because there is nothing can be pleaded to them.

Anonymus.

**A**n Indictment for not performing an Order of the Justices, for payment of a Hodys Rate.

It was moved to quash it, because it did not conclude, *Contrapacem*: Sed non allocatur, because it was not for a *Male-sesance*, but a *Non-sesance*. Ante 108.

*Horslam versus Turget.*

**M**Ich. 22 Car. 2. Rot. 687. Debt upon a Bond.

The Defendant demands Oyer of the Condition, which was to perform an Award; and sets forth, That there were divers Accompts, &c. between J. S. Testator of the Plaintiff, and the Defendant; and they submitted all Controversies to the Award of such an one, and that he awarded, that the Plaintiff should deliver certain Goods, of which the Testator died possessed, to the Defendant; and that the Defendant should pay unto the Plaintiff 320 l. And then sets forth the Custom of Foreign Attachments in London; that if a Suit were commenced against the Executor of any Person, any Debt which was due to the Testator tempore mortis sue might be attached; and then sets forth according to the common form, how this 320 l. was attached, &c. and avers, that there were no other Controversies, Differences or Matters between the Plaintiff and Defendant, but what concerned the Testator of the Plaintiff and him as his Executor only. 2 Keb. 716;  
731, 741.  
1 Lev. 306.

The Plaintiff replies, That the Defendant had not paid the 320 l. according to the Award, &c. upon which the Defendant demurred.

And whether this Money was attachable as a Debt due to the Testator tempore mortis sue, was the Question.



It was argued by Winnington, That it was: For it appears by the Averment, that it was awarded to be paid merely upon the Testator's Account, and it is but as it were a reducing the Testator's Debt to a Certainty; for an Award being no Record or Specialty, will not alter the nature of the Debt; and that clearly it should be Assets in the Executor's Hands; and the Custom of London was to have a liberal Construction.

Pemberton contra. It doth not appear, That there was any Debt due to the Testator: There might be Covenants, or other Matters between them, which shall be rather intended than Debt, as strongest against the Plaintiff; if there were, the Nature of the Debt is altered; for an Award may be pleaded in Bar to an Action brought upon the Original Debt.

Also this must have been sued for in the Debt and Detinet, and not in the Detinet only; so it is not a reducing the Debt to a Certainty; as where an Account is made upon Debts by simple Contracts; or where an Executor gives time for payment of a Bond due to the Testator; this is still attachable. 1 Roll. 551.

He denied it to be Assets. If it were, the Administrator de bonis non might sue for it after the Executor's Death, which clearly he could not do; and the Executor was chargeable only in proportion to the Debt extinguished, and not according to the Sum awarded, or at least it could not be Assets before recovered: If it were Assets, it did not follow it should be attachable; for if an Executor recovers in Trespass, for taking away the Testator's Goods, the Damages shall be Assets; yet they are not attachable: So Damages recovered upon Covenant made to the Testator.

He said, It would be very inconvenient that this Money should be attached, for the Executor was liable to a Devastavit upon this matter, and yet should have no remedy for the Sum awarded.

Again, It would be attachable in two respects, both as the Executor's Debt, (for so clearly it is) and as the Testator's Debt; and the Bond for Performance would be attachable for the Executor's Debt, and the Sum awarded for the Testator's. He said, All Customs ought to be taken strictly, and this was clearly out of the Words, as being no Debt due to the Testator tempore mortis suæ. And here it is pleaded, That it was commanded by the Court to the Officer to attach the Defendant by a Debt due to the Testator at the time of his Death, so no Authority to attach this Debt; and if it were by Law attachable, the Command ought to have been special.

The Court were all of Opinion, That this was not attachable as the Testator's Debt, for then the Administrator de bonis non might sue for it. And they held it to be like the Cases where the Executor takes Bond for a Debt due to his Testator, or where he sells the Goods, the Money for which they are sold cannot be attached; and here the Award is made of this Sum, in Consideration of conveying to the Defendant the Goods of the Testator, and releasing of his Debts, which seems to be all one with the other Cases.

And so they gave Judgment for the Plaintiff.

Termino Paschæ, Anno 23 Car. II.

In Banco Regis.

Error.

**A** Judgment out of an inferiour Court was reversed, because being by default the Enquiry of Damages was only by two Jurors, and Custom alledged to warrant it.

And it was resolved by the Court, That there cannot be less than twelve, though the Writ of Enquiry saith only per Sacramentum proborum & legalium hominum, and not duodecim as in a Venire.

Note, There were divers Recognizances taken before the Lord Chief Justice Kelynge; who died before his Hand was set to them.

2 Keb. 750.  
Cr. Car. 259,  
260.  
1 Sid. 233.

It was moved by Coleman, that they might be filed.

But the Court said a Certiorari must go to his Executors to certify them, and doubted whether they were compleat Records.

If a Warrant of Attorney be given after the Continuance-day, to enter up a Judgment as of the Term preceding; this may be well enough, if it be dated within the Term; but it cannot be so, if such a Warrant be given to confess a Judgment generally, and dated after the Term.

1 Sid. 222.

Q

Anonymus



Anonymus.

**A** Prohibition was prayed by one, who being a Churchwarden, was tendered an Oath by the Court-Christian, to present according to the Bishop's Articles, which he refusing to take, was excommunicated.

2 Keb. 771.

Now, for that some of the Articles enjoin to present Filthy Talkers, Revilers and Common Sowers of Sedition amongst Neighbours, which were general Terms, and might be understood to comprehend things out of their Jurisdiction, the Court conceived a Prohibition ought to go as to them.

Postea 127.

But he should have first pleaded there, quod non tenetur respondere as to those matters, and upon their Refusal to have prayed a Prohibition.

Elpicke *versus* Aston.

2 Saun. 74, 174.

Ante 71, 106.

2 Keb. 753, 767.

3 Cro. 837.

2 Sid. 174, 175.

**A** N Action of Trover was brought de diversis Vestimentis.

And held not to be good, because not expressed what kind of Garments.

But 7 Jac. Emery's Case, where Trover was brought for a Library of Books, and held to be good without expressing what they were; because to set down the particular Books, would make the Record too prolix. Vid. 3 Cro. 164. and Pl. Com. where a Man pleaded that he was chosen Knight of the Shire, per majorem numerum, and held to be good.

Barnard *versus* Michel.

Postea 126.

2 Keb. 754, 766.

**I**N an Action of Debt, the Plaintiff declared upon a Deed comprehending divers Covenants, for the performance of which the Defendant obliged himself in the penalty of 40 l. and sets forth that the Defendant had broke the Covenants.

The Defendant pleaded non est factum, and it was found for the Plaintiff.

And it was moved in Arrest of Judgment, That though the Issue was found for the Plaintiff; yet he having assigned no Breach, no Cause of Action appeared upon the Record; so he could have no Judgment.

For if the Declaration be insufficient, let the Defendant plead what he will, yet Judgment shall not be given against him.

Indeed if the Action had been brought upon a Bond conditioned for the Performance of Covenants, and non est factum had been pleaded; no Breach needed to have been assigned: For then the Declaration is only upon the Bond, without mentioning any thing of the Condition.

But

But here the Breach of the Covenant is, as it were, a Condition precedent, to entitle him to the Penalty; and here the declaring that he broke the Covenants without shewing which, or how, is altogether insufficient, though the Defendant, who pleads in the Negative, might have pleaded non infregit conventiones. Vid. Rastal's Entries 162. Pl. Com. 15. A Precedent just agreeing to this Case.

But the Opinion of the Court inclined for the Plaintiff here. Sed adjournatur. Vide Postea 126.

Dyer 297,  
298.

Anonymus.

A Mandamus was prayed to the Ecclesiastical Court, to swear two Church-wardens elected by the Parish, surmising that so was the Custom in that place; but that the Bishop's Officers had refused to admit them, upon pretence that the Parson ought to chuse one.

2 Keb. 753.

And it was granted. Vid. 2 Roll. 106, 107. 3 Cro. 551, 589. such a Writ granted.

The Case of the City of London and Coates.

Coates, who was imprisoned in Newgate by the Court of the Lord Mayor and Aldermen, brought an Habeas Corpus, and the Sheriffs returned, That the Custom of the City was, That if any Freeman hath forefalled any Fish, coming to any Market within the City, and complaint made thereof to the Court of Alderme and he appearing there confessing the same, and they ordain that he shall desist from such forefallowing, and he will not promise to obey; but declares in Court, That he will not obey their Order, That the Court there had time out of mind used to commit such Freeman, until he signified to the said Court, that he would conform himself.

2 Keb. 752.

Then it is returned, That complaint was made to the said Court, that this Coates had forefalled a great number of Lobsters; whereupon they caused him to appear, which he did, and confessed the same, and they ordained, That he should desist from such forefallowing; but he said obstinately and in Contempt of the Court, That he would not obey their Order; whereupon they committed him to Newgate, until he should signify to the Court, that he would conform himself, or otherwise be delivered by due course of Law.

The Return being filed,

It was moved by the Attorney General, That it was insufficient; for a Custom to commit a Man for forefallowing is void, and that Offence was always bailable, and so it appears by the



Register ; But here the Commitment is to remain in Prison, without Bail or Mainprise.

Also the Commitment is upon a Complaint without Oath, which ought not to be ; neither ought they to extort a Promise from him, to observe their Order, admitting it to be legal ; for an Oath cannot be imposed upon a Man to keep the Law.

Besides, The Custom is absurd, to commit a Man to Prison until he submits to the Court ; whereas a Man in Prison cannot come into Court to make such Submission ; and then suppose they will keep no Court, must a Man lie in Prison whilst they do ?

Then the Custom, as it is said, reserves the Discharge of him only to themselves ; tho' it is said, or by due Course of Law.

This Imprisonment looks in the Face of Magna Charta, which saith, nullus liber homo imprisonetur, &c. In all Offences finable, the Imprisonment is only to be until the Fine is paid ; if the Fine be tendered, there is to be no Imprisonment at all, and so resolved in Parliament. Br. tit. Imprisonment. 100.

To this it was answered by Jones on the other side, That the Imprisonment in this Case was not for foretelling, but for the Contempt to the Court.

It is returned, That he confessed the Fact, and yet declared that he would not conform himself to the Order of the Court ; the Proceeding is very mild, not to punish for an Offence unless committed after an Admonition in Court. It is implied in the Custom, That he may be delivered by due course of Law ; it is sufficient to express that in the Commitment, and so it is.

Also he cannot be prejudiced by the deferring of Courts, for the Custom is returned to keep the Court of Aldermen twice a Week.

It is not that he shall come in Person and submit to the Court, but that he shall signify his Conformity to the Court, which may be done by Letter or Message ; and it is returned, That he did not by any means submit himself.

Twisden. The Custom doth not here come in Question. The Commitment is returned to be for a Contempt to the Court ; It must be allowed they have such Power, for they are a Court of Record. Langham was committed for refusing to take the Oath usually administered to Sheriffs ; and resolved to be good, because it concerned the Government. The City hath the Regulation of Trade, and Orders made by them that one Man should not use the Sign of another, and for distinguishing Trades, (viz.) That a Plasterer should not use the Trade of a Bricklayer, and such like, have been allowed.

Wherefore the Court remanded the Prisoner, he promising to make Submission at the next Court, and the Sheriff promising he should be discharged thereupon.

Phillips

1 Mod. 10.  
1 Sid. 287.

Phillips *versus* Kingston.

**H**ill. 22 & 23 Car. 2. In an Action of Slander the words were, He hath broke three or four of his Father's Ribs, of which he shortly after died, and I will complain to a Justice of him: He may be hang'd for the Murder altho' it were done twenty years since.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that he did this Hurt to his Father against his Will, as it might be intended; and tho' the Defendant said he might be hanged for it, that is but his Judgment and Collection thereupon.

As Jacob and Mills's Case, 2 Cro. 343. where the Words were, Thou hast poisoned Smith, and it shall cost me an hundred pounds but I will have you hanged for it. And it was resolved, That an Action did not lie, because it might be unwillingly done. Hob. 6. Politea 149.

Also it is not averred that the Father was dead, and that is necessary; for otherwise it shall be taken that he is alive, and then 'tis no Slander; and so is Yelverton 21 and Hob. 6.

But the Court held, That the Plaintiff must have his Judgment; for taking all the words together, the Defendant must necessarily intend a murderous Killing; and for the not averring that he was dead, Twisden said, the later Opinions have all been, that this is not necessary; and the Action lies, unless it appears upon the Record that the Party is alive. <sup>1 Sid. 53.</sup>  
<sup>1 Keb. 141.</sup>

## Anonymus.

**I**n an Action for Words the Plaintiff declared, That he was a <sup>2 Saun. 307.</sup> Woollen-Draper; and the Defendant said of him, You are a <sup>1 Lev. 280.</sup> cheating Fellow, and keep a false Book.

After Verdict for the Plaintiff it was moved in Arrest of Judgment, That the words might not be intended to relate to his Trade; for they were capable of another Sense, and there was no colloquium of his Trade.

Sed non allocatur: For they must be intended of a Debt-Book which Shop-keepers keep, and to say such an one keeps a false Book, it is a great Slander to him in his Trade. Vid. 1 Cro. 403.

Twisden cited a Case, Where Roberts an Attorney brought an Action for saying, Go tell the black Knave Roberts, That I will teach him, or any Attorney in England, to sue out a Writ against me, and he had Judgment; for it was as much as to call him Knave Attorney. Hill. 22 & 23 Car. 2. Rot. 1426.

Methwin



## Methwin and the Hundred of Thistleworth.

Postea 225.

Raym. 221.

2 Keb. 760.

3 Keb. 115.

2 Lev. 4.

**A**N Action was brought upon the Statute of Winton. The Defendants pleaded, That they made Hue and Cry, and that within 40 Days they took one Dudley, which was one of them that did the Robbery, and had him in custody.

The Plaintiff replied, That Dudley was not taken upon their fresh Pursuit modo & forma.

And upon this Issue the Jury find a Special Verdict to this effect;

That the Hundred made Hue and Cry, and that Sir Joseph Ash finding Dudley in the presence of Sir Philip Howard, a Justice of the Peace of Westminster, at his House in Westminster, the said Sir Joseph being an Inhabitant in the Hundred of Thistleworth, charged Dudley with this Robbery before Sir Philip, who promised he would appear at the Sessions at the Old Bailey.

And whether this be such a Taking as is put in Issue, they referred to the Judgment of the Court.

Jones for the Plaintiff argued, That in this Case there doth not appear to be any Taking at all, but only a Discourse between Sir Joseph Ash and Sir Philip Howard. As admitting the Issue were, Whether a Man were arrested or no? And it should appear upon Evidence that one should come to the Sheriff and declare, That he had a Writ against such a Man then present; and upon this the Sheriff should say, I will take his word for his Appearance; this clearly could not be taken for an Arrest.

Again, The Issue is, Whether he were taken upon the fresh Pursuit of the Hundred? And it doth not appear by the Verdict that there was any Hue and Cry made this way, and it might be ceased before this time: But it seems rather, that Sir Joseph Ash found him by accident.

But the Opinion of Hale Chief Justice, Twisden, Rainsford and Moreton, was, That Judgment ought to be given for the Defendant: For the charging of Dudley with the Robbery in the presence of a Justice of the Peace was clearly a Taking within the Statute.

For being in the presence, which the Law construes to be under the Power or Custody, of the Magistrate, it would have been vain and impertinent to have laid hold of him; and it shall be intended, that this was upon fresh Pursuit: For when the Verdict refers one special Point to the Judgment of the Court, all other matters shall be intended. Postea 235.

And

And the Chief Justice said, That if the Hue and Cry was made towards one part of the County, and an Inhabitant of the Hundred apprehended one of the Robbers within another; yet this was a Taking within the Statute.

Hornsey (Administrator of Jane Lane) *versus* Dimocke.

**T**HE Plaintiff, as Administrator of Jane Lane, brought an Assumpsit, and declared, That he had formerly deposited such a Sum in the Defendant's hands, for the use of the Intestate Jane Lane; in Consideration whereof the Defendant promised to the Plaintiff, that he would pay it her; or if she died before 18 years of Age, that he would pay it to her Executors: And shews, That she died before 18, and that he had not paid it to the Plaintiff, her Administrator, licet sæpius requisitus.

Upon non Assumpsit, a Verdict was for the Plaintiff.

It was moved in Arrest of Judgment, That the Plaintiff brought this Action as Administrator, which ought to have been in his own right; for the Promise was made to him. Moor, 887.

Sed non allocatur: for if a Man names himself Executor or Administrator, and it appears that the Cause of Action is in his own right, it shall be well enough, and he calling himself Executor, &c. is but Surplusage. But here it seemeth Jane Lane might have brought an Assumpsit, because she was the Party to whom the Money was to be paid. So it is good either way. Hob. 288. Bendloe in Kell, 277, 6.

It was further objected, That it was not averred, that the Defendant did not pay the Money to Jane Lane during her Life.

Sed non allocatur: for 'tis aided by the Verdict. As the Chief Justice said a Case was adjudged, where an Assumpsit was brought upon a Promise to pay Money to two or either of them; and declared that the Money was not paid to the two, and not said, or either of them; yet resolved to be good after Verdict.

Matthews *versus* Crosse.

**I**N Debt for Rent the Plaintiff declared, That by an Indenture made in the Parish of St. Mary Undershaft, London, he let an House to the Defendant, situate in parvo Turris monte, reserving so much Rent, &c. 2 Keb 762.

The Defendant pleads, That before the Rent incurred, the Plaintiff entred into a certain Room of the said House, apud parvum Turris montem prædict', and so suspended his Rent, upon which it was demurred.



And it was shewn for Cause, That no Place was alledged where the Entry was, but said to be at Little Tower-Hill, which cannot be intended a Will. And a Case was cited of an Indiamment in this Court, of a Fact said to be done at Whitehall, and quashed for want of Place. And to this the Court inclined; but the Matter was ended by Compromise.

Anonymus.

2 Keb. 780.

**A** Prohibition was prayed to a Suit for a Pension in the Ecclesiastical Court, surmising that the Lands out of which it was demanded were Monastery Lands, which came to the King; and that he granted the Lands, &c. under which Grant the Plaintiff claims; and that he covenanted to discharge the said Lands of all Pensions, &c. and this upon the Statute of 34 H. 8. cap. 19. which appoints the Suit to be for Pensions in such Cases in the Court of Augmentations, and not elsewhere.

But the Court would not grant it, until the Letters Patents of Discharge were produced, being a matter of Record.

But where the Surmise is of matter of Fact, it is sufficient to suggest it.

Ante 3.

1 Mod. 218.

Postea 265,

274, 335.

And it was said by the Court, That Pensions, whether by Prescription or otherwise, might be sued for in the Ecclesiastical Court; but if by Prescription, then there was also Remedy at the Common Law. F. N. B. 50. 1 Cro. 675.

Davis *versus* Wright & al.

2 Lev. 3.

2 Keb. 744,

758.

**H**ill. 22 & 23 Car. 2. Rot. 701. In an Assumpsit the Plaintiff declared, That his Father gave him by his Will 3 l. per annum during his Life, and that he was about to sue for it; and that the Defendants being Executors to the Father, in Consideration that the Plaintiff would forbear to commence a Suit against them for it, promised to pay him.

The Defendants plead, That the Testator was indebted in divers Sums, and ultra to pay them they had no Assets.

To this the Plaintiff demurred; for that by this Promise the Defendants have made it their proper Debt.

1 Cro. 804.

Yelv. 84,

184.

Postea 159.

But it was said on the other side, That if there were no Assets there was no cause for the Plaintiff to have commenced a Suit: And to stay a causeless Suit can be no Consideration, as the Case of Smith and Jones, 2 Cro. 257. where one having married an Executrix, after her decease promised J. S. that if he would forbear a Suit against him for a Legacy, he would pay it.

It was held to be a void Promise, being in no wise liable to be sued after the Death of his Wife: And the Opinion of my Lord Coke, 9 Rep. 94. in Banc's Case is, That an Executor shall not be charged with such Promise, unless he hath Assets.

But the Court resolved for the Plaintiff: For it is not material whether the Defendants had Assets or not at the time of the Promise; for by the Promise they caused the Plaintiff to desist, who peradventure at that time was prepared to prove Assets; and relying upon such Promise might be much to his prejudice, if he could not afterwards recover upon it.

But the Chief Justice said, If it had appeared upon the Declaration that there were no Assets, the Plaintiff by shewing that would have destroyed his Action.

Vere *versus* Smith.

**I**n Debt upon an Obligation.

The Condition recited, That the Defendant served the Plaintiff as a Brewer's Clerk, and that if he performed such Covenants, &c.

2 Keb. 761,  
779, 830.  
2 Lev. 3.

The Defendant pleads, *performavit omnia*.

The Plaintiff replies, That one of the Covenants was to give the Plaintiff a true Accompt of all such Moneys as the Defendant should receive, &c. whensoever he should be thereunto requested; and alledged, That 30 l. came to his Hands, and that he requested him to give an Accompt of it, which he refused to do.

The Defendant rejoins, confessing the Receipt of the said Money, but saith, That before Request made by the Plaintiff, he laid it up in the Plaintiff's Warehouse, and that certain Malefactors (to the Defendant unknown) stole it away, & hoc paratus est verificare. And to this the Plaintiff demurs generally.

And Jones argued, That the matter contained in the Rejoinder was a Departure from the Bar, for it doth not amount to an Accompt, but rather an Excuse or Discharge of himself, why he should not accompt.

Again, he ought not to have averred his Plea, but to have concluded to the Country: For the Plaintiff in his Replication having alledged, That he gave no Accompt, and the Defendant in his Rejoinder setting forth, That he did give an Accompt, there is an Issue joined: wherefore it ought to have been concluded, & de hoc ponit se super Patriam.

But these Matters were over-ruled.

For as to the first, the Court held it no Departure, but a fortification of the Bar; for shewing that he was robbed, is a giving an Accompt.

R

And



And as to the second, the Conclusion is proper; because the Defendant alledges new Matter, and therefore ought to give the Plaintiff liberty to come in with a Surrejoinder and answer to it; for he doth not only say, that he gave an Accompt, but sets forth the special Matter how.

Wherefore the Court gave Judgment for the Defendant.

Note, A Clerk of the Court must appear *de die in diem* to any Matters against him on the Crown-side, as well as on the Plea-side.

Reynell *versus* Heale.

2 Keb. 764,  
776, 788,  
877.

**A**N Information was brought upon the new Statute against Conventicles; for that the Defendant being a Justice of the Peace in Devonshire, and Complaint being made to him by Reynell of a Conventicle, he refused to go to the place to suppress it; and sets forth three Omissions of that kind, and that the Statute enacts, That a Justice of Peace, for every such Neglect of doing his Duty, shall forfeit 100 l. the one Moiety to the King, the other to the Informer; & *unde actio accrevit* for 100 l. to the King and himself.

The Defendant pleads non debet the said 100 l. to the Informer, nec aliquam inde parcellam, & de hoc ponit se super Patriam, & pradi<sup>a</sup> Reynell similiter.

And upon this Issue Verdict was given for the Informer.

Jones moved in Arrest of Judgment, That he conceived there were no Words in the Act to oblige the Justice of the Peace upon such Information, to go in Person to the Place where such Meeting is; and 'tis not said here, that he refused to grant a Warrant, or the like.

But he did not much insist upon that, but moved that the Issue was not well joined; for it is only between the Informer and the Defendant, and so the Plea is quod non debet to the Informer, and no mention of the King; whereas the Action is qui tam, and the Act gives the Moiety of the Penalty to the King.

The Court said nothing to the first matter, but held clearly that the Issue was misjoined; and said, That a Repleader ought to be awarded.

Pollexfen and Ashford *versus* Crispin.

2 Keb. 757,  
765.

**H**ILL. 22 & 23 Car. 2. Rot. 225. The Plaintiffs brought Trespass, Quare pisces suos cepit in separali Piscaria.

Upon Not Guilty pleaded, and Verdict for the Plaintiffs, it was moved in Arrest of Judgment, That the Plaintiffs ought not to have called them Pisces suos, unless they had been in a Trunk or Pond:

For there is no more Property in Fishes in a several Piscary, than in a free Piscary.

In an Action for taking of Conies in a Warren, he shall not say Cuniculos suos; and this is such a Default as the Verdict shall not aid. Sed non allocatur. 53 Co. 34, b.  
F. N. B. 192,  
193.  
2 Cro. 195

For the Chief Justice said, It might be intended a Stew-Pond, which is a Man's several Piscary; and after a Verdict the Court shall admit any Intendment to make the Case good.

And Twisden cited a Case which was in Trespass; Quare Phasianos suos cepit, and the Plaintiff had Judgment after Verdict; for it shall be intended they were dead Pheasants. And the Case of Child and Greenhill, 3 Cro. 553. is the same with this.

But the Court held, That it had been good upon a Demurrer, by reason of the local Property; and so is the Register. Raym. 16.  
1 Jones. 440.

*Hoskins versus Robbins.*

**I**n Replevin the Defendant avowed for Damage feasant.

The Plaintiff replies and saith, That the place Where is parcel of the Masse of such a Manor, within which Manor there are Copyholds demisable time out of mind; and that the Copyholders have had time out mind the sole feeding of the said Masse; and that J. S. being a Copyholder of the said Manor, licenced him to put in his Cattel. Postea 163.  
2 Saund. 324.  
1 Mod. 74.  
2 Keb. 757,  
842.  
Apres 163.  
2 Lev. 2.  
1 Lev. 269.  
1 Cro. 434.  
2 Cro. 256.

The Defendant traverses the Prescription, and it was found for the Plaintiff.

Levinz moved in Arrest of Judgment, that Prescription to have the sole Feeding, whereby the Lord shall be excluded from all the benefit of his Soil, is not allowable; and the Lord cannot in this case ever make any profit of the Mines, for he may not dig.

'Tis true, a Prescription may be to have the sole feeding from such a Day; for there the Owner hath his time also.

Again, he alledges a Custom of Demising Copyholds, and doth not say for what Estate, neither doth he name any Copyholders; also he should have averred, That the Beasts were levant and couchant.

One prescribed to have omnes Spinās, per laid them to be spent in a certain house. And the Verdict shall not help the Defect, as this Case is; but if the Copyholder had pleaded so himself, it should: for after a Verdict it is intended they were levant and couchant; but that cannot be in case of a Stranger justifying by Licence.

He took another Exception also, That a Licence was pleaded here, and not shewn to be by Deed, as it appears it ought to be.

2 Cro. 575.



As to the first it was answered, That this Prescription did not take all the profit from the Owner of the Soil, for there might be Trees and Bushes growing; and if any one should dig the Soil and discover Mines, the Lord would recover Damage in respect of the Mines. Such an Interest as this might commence by Grant, and therefore lies in Prescription. The same Opinion might be made against the sole Feeding for some part of the Year; for the Property of the Soil remains in the Lord at that time also, when the Profit is divided from him, and it may be as well allowed for a longer as a shorter time; this is no more than the Herbage or Pasture of the Land. And Prescription to dig Turfs cuts as deep into the Profits, and yet that may be in one, and the Soil in another.

As to the second, It is not needful to shew for what Estates the Copyholds have been demised; for it is not laid by way of Prescription in them (for then it would be material to shew that they had such Estates, as might support a Prescription) but as a Custom in the Manor; and to have named them would have made a Repugnancy, (viz.) that such particular Copyholders had the sole Feeding time out of mind. 3 Cro. 311.

Yelv. 187.

Neither is it needful to alledge, That the Beasts were levant and couchant, in regard that he claims the sole Feeding; which may therefore be with what Beasts he please.

And it is not needful, That the Licence should in this Case be by Deed; for it passeth no Interest, and serves but for an Excuse of the Trespass; and 'tis for no certain time, but only pro hac vice.

Ante 25.  
Postea 163;  
165.

The Opinion of the Court inclined for the Plaintiff. Sed adjournatur. Vide postea 163.

The Duke of Richmond *versus* Wise.

2 Keb. 759.  
767.

**I**n an Ejectment the Parties had a Trial at Bar, and a Verdict for the Plaintiff.

The Court were moved to set aside this Verdict, upon an Affidavit made of these Misbehaviours in the Jury, (viz.) That they had Bottles of Wine brought them before they had given their Verdict, which were put in a Bill together with Wine and other things, which were eat and drunk by the Servants of the Jury, and the Tipstaves that attended them at the Tavern where they were consulting their Verdict.

That this Bill (after the Verdict given) was paid by the Plaintiff's Solicitor; and that after they had given up their Party Verdict, they were treated at the Tavern by the Plaintiff's Solicitor, before their affirmance of it in Court.

Counsel being heard on both sides, as to these matters, the Court delivered their Opinions seriatim, that the Verdict should stand.

They

They said they were not upon a discretionary setting aside of the Verdict, as when the Jury goes against Evidence; but whether these miscarriages shall avoid it in point of Law.

They all agreed, That if the Jury eat or drank at the Charge of the Party for whom they find the Verdict, it disannuls the Verdict; but here it doth not appear, that the Wine they drank was had by the order of the Plaintiff, or any Agent for him.

'Tis true, in regard his Solicitor paid for it afterwards, it doth induce a Presumption that he bespoke it; but that again is extenuated by its being put into a Bill with other things that were allowable; and if the Verdict should be quashed for this Cause, it must be entered upon the Roll, that it was for drinking at the Plaintiff's charge, and it is not proved, that this Wine was provided by him. 1 Cro. 66.

And as to the other matter, That they received a Treat from the Plaintiff after their Privy Verdict given, and before it was given up in Court, that shall not avoid their Verdict.

But if the Defendant had treated them, and they had changed their Verdict, as they might have done in Court, it should then have been void. Co. Lit. 227. b. If after the Jury be agreed on their Verdict, (which the Chief Justice said must be intended, such an Agreement as hath the signature of the Court put upon it, viz. A Privy Verdict) they eat and drink at the Charge of him for whom they do pass it, it shall not avoid the Verdict; and if it should, the Court said most Verdicts given at the Assizes would be void; for there 'tis usual for the Jury to receive a Collation after their Privy Verdict given, from him for whom they find. But such Practice ought not to be, and if any of the Parties, their Attorneys or Solicitors, speak any thing to the Jury, before they are agreed relating to the Cause, (viz.) That it is a clear Cause, or I hope you will find for such an one, or the like, and they find accordingly, it shall avoid the Verdict; but if Words of Salutation, or the like, pass between them; (as was endeavoured to be proved in this Case) they shall not. Also if after they depart from the Bar, any matter of Evidence be given them, as Depositions or the like, tho' the Jury swear they never looked on them, yet that shall quash their Verdict. But they all held in this Case, That though there was great matter of Suspicion, yet there was not matter of clear Proof (as there ought to be) sufficient to disannul this Verdict; but they said it was a great Misdemeanour in the Jury, for which they ought to be fined, and that the Plaintiff's Solicitor had carried himself with much blame and indiscretion; and the two Tipstaves which attended the Jury, for that they were not more careful, but connived at these matters, were fined, the one 40 Shillings, (who appeared to be most in fault) and the other 20 Shillings.



Barnard *versus* Michel.Het. 114,  
115.

**H**ILL. 22 & 23 Car. 2. Rot. 865. The Case was moved again, and by the Opinion of all the Court, Judgment was given for the Plaintiff, being after a Verdict.

For though the pleading, That he broke all the Covenants, would not have been good upon a Demurrer, as they said, for two Reasons.

First, For that it would have been double, in regard that the Breach of any one of them would have intitled the Plaintiff to the Penalty.

Secondly, For that some of the Covenants were such as he ought to have assigned a special Breach upon, that it might have been in the Judgment of the Court, yet now the Verdict hath aided these Defences.

Pellow *versus* Kingsford.2 Lev. 1.  
2 Keb. 756.

**I**N an Action of Debt sur l' Estatute 2 E. 6. for not setting out of Tithes. After Verdict for the Plaintiff it was moved in Arrest of Judgment,

Vid. 2 Cro.  
68.  
Yelv. 63.

That the Lands out of which the Tithes were demanded, were shewn in the Declaration to lie in two Parishes; so that the Plaintiff ought to have made several Titles, and also to have shewn how the Tithes should have been set out upon the Land, (viz.) how much in one Parish, and how much in the other.

But it was held to be well enough; for this Action is but in the nature of Trespass, and to punish the Tort in not performing the Statute.

## Anonymus.

2 Keb. 761,  
763.

**I**N an Information upon the Statute of Usury. After Verdict at the Assizes for the King, it was moved in Arrest of Judgment, That the Venire was not well awarded, for it was entred *ideo ven' inde jur'*; whereas it should have been *præceptum est Vicecomiti, &c.*

The Court commanded to search Precedents, and were informed that they were generally so.

Anonymus.

A Prohibition was prayed on the behalf of a Church-warden, to the Ecclesiastical Court, for that they tendered him an Oath upon these Articles following. Antea 114.

First, whether any Person within his Parish hath encroached upon the Church-yard?

Secondly, Whether any Person within his Parish were an Adulterer, or filthy Talker, Sower of Sedition, Faction, or Discord amongst their Neighbours?

Thirdly, Whether there were any which did not resort to their Parish Church, receive the Sacraments, &c.

It was said to the first of these, That it concerned Matter of freehold. But this was over-ruled, for they may take notice of Encroachments upon the Church-yard,

And to the second, Sowing of Sedition amongst Neighbours is inquirable in the Lect, and the Bishop's Court hath nothing to do with it. Besides, this Oath would oblige him to charge himself criminally; for it is whether any Person within the Parish, &c. so that himself is included.

And as to the Sowing of Discord, the Court held it did not belong to them. Ante 114.

But they held, That the general words would not extend to the Church-warden himself; but intended to relate only to the rest of the Parish.

But upon examination of the Matter it appeared, That the Oath tendered was only in general words, (viz.) To make Presentations according to the King's Ecclesiastical Law. And these Articles were offered only by way of Direction, & quasi a Charge. Wherefore the Court denied the Prohibition.

Anonymus.

IN Replevin of Beasts taken at D the Defendant pleads in Abatement, That they were taken at another place; absque hoc, that they were taken at D. Et pro Return' habend', he avows for Rent reserved upon a Lease. The Plaintiff replies, and traverses the Lease, which should not be; for though the Defendant when he pleads such a Plea in Abatement, must also avow to have a Return; yet the Plaintiff cannot answer to it, but must take Issue upon the other Matter. Postea 249. Trin. 9 W. in B. R. 1 Cro. 896.

Sir



Sir William Smith *versus* Wheeler.

1 Mod. 16,  
38.  
2 Keb. 564,  
608, &c.  
1 Lev. 279.

**I**N Error upon a Judgment in the Common Pleas in Ejectment, for the Rectory of Hadnam in the County of Bucks, where the Jury found as to a third part of the Rectory, the Defendant Not Guilty.

And to the other two parts, a Special Verdict to this effect.

That Simon Maine was possessed of the two parts of the Rectory for 80 Years, and in the Year 1643. made by Indenture an Assignment of them to Crook and Bleak upon these Trusts following, (viz.) In trust for himself for Life, and after his Decease for the payment of his Debts, and for the raising of several Sums to be paid to divers of his Kindred. Proviso, That if he shall at the time of his Death leave a Child, or his Wife *Enseint*, then that it shall be to such Trust and Use as he shall limit and appoint by his Will, and if he made no such Appointment, then to be in Trust for such his Issue. Provided further, That if *Simon Maine* should be minded, or willing at any time to make void the present Indenture, or to frustrate any Use or Trust therein, or create any new, or to dispose the Estate to any other Person, or any other way, and such his purpose shall declare by Writing, under his Hand and Seal before Witness, &c. that then, and thenceforth the Trusts therein, &c. or so many of them, &c. should be void, &c.

Then they find that in 1644 he had Issue a Son, and that he took the Profits thereof during his Life, and made several Leases of the Premises,

That the Assignees had no notice of this Trust during his Life, and that after his Death one of them assented, and the other dissented to it.

They find that in 1648 he committed Treason. and was thereof attainted.

They find the Act of 12 Car. nunc, cap. 30. whereby it is enacted, That all Manors, Lands, &c. Leases for years, &c. which he or any to his use, or in trust for him had, 25 Mar. 1646. or at any time since, shall stand and be forfeited, &c. and also all Rights and Conditions. &c.

They find that the said Simon Maine died in 1661, and that the King made a Grant to Sir William Smith the Plaintiff.

It was adjudged for Wheeler in the Common Pleas, Pasch. 20. Car. 2. by Tyrrel and Archer, who were then the only Judges in the Court; and Sir William Smith brought a Writ of Error in this Court, and after divers Arguments at the Bar, the Judgment was affirmed this Term, by the Opinion of the whole Court.

Moreton. I shall say nothing to the marks of Fraud found in the Verdict; for tho' at first the Counsel of the Plaintiff insisted, That the Court ought thereupon to adjudge the Settlement fraudulent; yet it hath been since by them declined, wherefore I shall waive that.

The matter is, Whether there be any thing forfeited longer than the Life of Maine?

It hath been objected, That in regard Simon Maine hath a Power of altering the Trusts and disposing of them otherwise, that this should amount to an implied Trust in him of the whole Term; but that cannot be, for after his Decease, the Trust is expressly limited to others.

'Tis true, he had a Power of disposing, but that was to be executed at Election, and by such Circumstances as were individually privy to himself.

For it was to be done by his Will, according to the first Proviso; and by the second, to be done by Writing under his Hand and Seal; so not like to Englefield's Case, in the 7 Co. 11. b. where the Power of Revocation was to be executed by the tender of a Ring, which any one might do as well as the Party himself.

But indeed this is the same case with the D. of Norfolk's, cited 7 Co. 12. c. in the same Report; and the Statute of the 33 H. 8. of Forfeiture upon that Attainder, was penned as amply as this of 12 Car. and the Case of Warner and Harding, Latch 25. is very like this: W. Shelley enfeoffed divers to the use of himself for Life, and afterwards to divers others upon Condition, That if a Ring were delivered by the said W. Shelley, declaring that he intended those Uses should be void, that then, &c. It was resolved, That nothing was forfeited, but during his Life.

Rainsford. I shall speak nothing to the Fraud, because that is a pure matter of Fact, which is to be found by the Jury, and cannot in any Case be presumed by the Court.

I am of Opinion, That the Judgment ought to be affirmed.

The power of altering the Trusts reserved by the first Proviso, is inseparable from the Person of Simon Maine, for it is to be by his Will. In Moor 193. the Lord Pager's Case, it is resolved, That inseparable Powers are not forfeited upon like Words as are in this Act, and so the second Proviso limits to him a double Power,

First, Of revoking the old Trusts;

Secondly, Of limiting new. But this is to be done by Writing, under his Hand and Seal in the presence of two Witnesses, so the Performance of this also is personal.

The D. of Norfolk's Case is the very same, unless for that it was there under his proper Hand and Seal, and here under his Hand and Seal, which certainly is all one.

S

But



But admitting this Power were forfeited, yet it is not found that ever it was executed after it came to the King, which must be before any Estate could come to the King; therefore in Englefield's Case it was found, that a Ring was tendered in the behalf of the Queen.

And whereas it was objected, That he had *jus disponendi*, and therefore might forfeit, as a Man shall a Term which he hath in right of his Wife, as Dame Hale's Case in Plowden is resolved; I answer, That here he hath not *jus disponendi*, but rather *potestatem disponendi*, but that is qualified, and to be executed by certain Circumstances, which must be performed to give it effect.

Lane 47.

Twisden. As to the Fraud, I cannot see how the Jury could have found this a fraudulent Settlement, made to prevent a Forfeiture enacted by Parliament 20 years after, which surely could not be without the Spirit of Prophecy.

I am of the same Opinion, as to the matter, with my two Brothers,

That Simon Maine had only a Trust in him during his own Life; and if he had brought a Bill in Equity, he could have had the Estate executed no further, and therefore can forfeit no more by this Act; and it is not always, that a Man that hath Power over Land, hath a Trust, as we may see in Cranmer's Case, Dyer 308, 309. There were as large Words in the Act of his Attainder as here.

Indeed the Argument in Englefield's Case, 7 Co. rules thus; for if a Trust had been implied in the Power of Revocation, they needed to have argued, that it should have been forfeited as a Condition; so the D. of Norfolk's Case; for tho' the word Use is in that Act, and not Trust as in this, yet it makes no difference, for an Use was then the same with what a Trust is now; and tho' the word Power had been in this Act, yet there should have been no Forfeiture in this Case, because the Execution of it is so personal and individual.

Neither is there found, That ever there was any Execution, and at most the Forfeiture could only be of what was in Simon Maine; neither can Smith execute it by vertue of his Grant from the King; for the King's Patent conveys nothing by Implication, and shall never work to a double Intent.

Hale Chief Justice of the same Opinion.

First, Crooke is a good Lessor, for the other Trustee's disagreement makes the Estate wholly his.

Secondly, For the Circumstances of Fraud, they are not material to be considered.

Thirdly, The Trust is wholly disposed of after the Death of Simon Maine, so that he had nothing but during his Life.

Fourthly,

Fourthly, Then what is operated by the Attainder? Why the Trust during Life is forfeited. Vide the C. of Somerset's Case, Hob. 214. 2 Cro. 512. But then this Trust must have been executed by the Court of Revenue. 'Tis true, the Aa doth not only give the Trust, but the Term it self to the King, that is, during the Life of Simon Maine: so that by this Aa, so much of the Term is drawn out of the Trustees, as served the Trust which S. M. had, but leaves the residue of the Term to serve the other Trusts; so that the possibility of the Term returns to the Trustees, after the Death of S. M. and this appears by the body of the Aa.

Also this appears by the saving in the Aa. The first saving, which saves all the Conveyances, made by the Feoffor before the 29 of Sept. 1659, indeed might not help, because Conveyances made to the Wives, Children or Heirs, are therein excepted. But there the other Proviso saves the Right, Interest, &c. of all Persons whatsoever, both in Law and Equity, not derived from the Offenders since 25 Mar. 1646. and therein the Interest of Wife or Children, and all are saved; now this Estate was created before, (viz.) 1643. I come now to the Proviso's.

The first Proviso determines nothing till the time of Simon Maine's Death; and consequently this can revert no more to M. than he had before. For the Condition is in Expectation till he have a Son living at the time of his Death; why then, by this there comes nothing to S. M. so much as in point of Execution during his Life: By his Will he might have limited new Uses, but he made none; and 'tis personal: No other Man can make his Will.

Why then all stands as it did, and nothing is made void till the time of his Death, and then all is immediately executed to the Son, by force of the first Conveyance. But if the Proviso had been, That if S. M. had a Son, there all had reverted in S. M. and might have been forfeited.

The last Proviso doth not create a Trust to him, for if he had not been attainted, the Trust should not have gone to his Executors, &c. No, it creates a personal Power of fetching back the former, and declaring new Trusts, observing the Circumstances; upon the same reason that this Estate can be forfeited, a bare Executor, (I mean, without a Devise of the Residue) might forfeit his Estate; this is a Power, yea, and 'tis a manacled Power, it is a kind of Trust that he may revoke.

The D. of Norfolk's Case is the same with this: So Harding and Warner's Case which was adjudged in C. Banco, tho' there were there two to two, and it was confessed by the King's Attorney in Scaccario, and the King's Attorney doth not use to confess Judgment in Cases of great Moment, without Consultation of the Judges. This Power was not, nor could be passed to the King by general Words of all Lands, &c. Conditions, &c. 3 Co. 2. a. b. much less



could it pass from the King, (if it could pass at all) by general Words; but I rest upon this,

First, That it is a Power or kind of Trust to revoke, but no Condition.

Secondly, At least not such a Condition as is given to the King.

Thirdly, If it were, it ought to have been executed by the same means, as it should have been by S. M.

In Englefield's Case there was no Pretence to have more than to execute the Condition; it ought here to have been executed in the Life of S. M. and so it appears to be done in Englefield's Case, and Harding and Warner's Case, for I caused the Cases to be searched. This is like the Case of the Statutes of 15 R. 2. cap. 5. 1 R. 3. cap. 1. 19 H. 7. cap. 15. These Statutes give the same advantage to Lords, &c. where Persons have Uses in Lands respectively, as if they had the very Lands; but the Lords, &c. cannot thereby claim any greater Interest than the Cestui que uses had respectively in the Uses.

Now in this Case, the Body of the Añ and the Proviso fetch back and save the Trusts for all but S. M. As to the Execution for the King's Debts it differs for the Process; for they ever did, and do *fun de terris de quibus illi aut aliquis ad eorum usum*, &c. 'Tis true, in Sir Charles Hatton's Case it was resolved, That the King's Debt should be executed upon Land wherein he had a Power of Revocation. Vide Chirton's Case. 11 Co. 92. And so Judgment was affirmed per totam Curiam.

Termino Sanctæ Trinitatis, Anno 23 Car. II.

In Banco Regis.

Anonymus.

**I**N Debt upon a Bond. After a Verdict for the Plaintiff, the Judgment was entered *quod recuperet the Sum pro misis & custag'* instead of *pro debito præd'*. But this was ordered to be amended, as the Default of the Clerk, tho' in another Term; the Court having Power over their own Entries and Judgments.

Anonymus.

Anonymus.

**I**N an Accompt it was held by the Court, That if a Merchant delivers Money to his Bailiff or Factor, to lay out for him in Commodities, he cannot bring an Assumpsit, but only his Action of Accompt.

For the Chief Justice said, That he knew such an Action once brought, and the Jury that were to try the Cause informed him, That if they should examine all the Accompts which were between the Plaintiff and Defendant, it would take up three or four days time. So that it hath been holden, that in such case he should be driven to his proper Remedy, which is an Action of Accompt; and it may be the Factor hath laid out more Money than he received.

Eaton *versus* Barker.

**I**N an Action upon the Statute of 17 Car. nunc, for residing in a place where he had formerly kept a Conventicle, and demands the 40 l. Penalty. 2 Keb. 781, 788. Postea 134, 135.

After a Verdict for the Plaintiff, it was moved by him, That he might have his Costs taxed him; for where a Statute gives a certain Penalty, if this be not paid upon Demand, he that sues for it shall recover his Costs and Damages; as North and Wingate's Case in the 3 Cro. 559. is.

But the Court held, That they ought not to be given in Actions Popular, whether the Forfeiture be certain or not; but where a certain Penalty is given to the Party grieved, there he shall recover his Costs and Damages. 10 Co. 116. Vide postea 134, 135.

Pollexfen *versus* Pollexfen.

**I**N a Prohibition; the Case was, That Henry Pollexfen died intestate. 2 Keb. 768, 778, 779. 2 Lev. 6.

Andrew, his Brother, gets Letters of Administration in the Inferiour Diocess.

One who pretended to be the Wife of H. surmising Bona norabilia, procured Administration from the Prerogative Court.

Andrew appeals to the Delegates, and dies.

Henry, his Son and Heir, comes in, and gets the Administration (committed in the Prerogative Court) repealed, and hath Letters granted to himself.

Upon this the Wife prayed a Prohibition, supposing that the Delegates could not proceed after the Death of Andrew; but that their Commission was determined: For their Authority is by that, to proceed in a Case between such Parties, one of which is dead.

Co



3 Co. 653,  
679.  
Het. 107.

To which it is answered, That the Commission is to hear and determine the Cause. And both in the Civil and Ecclesiastical Law, the Suit shall continue after the Death of either Party for those which shall be concerned, as appears by the Bishop of Carlisle's Case, in 2 Cro. 483. And in the 1st Leonard 117 and 178, it is said, That if one Party dies ante litem contestationem, then it shall abate; but if after, it is otherwise. And there are a number of Precedents of this nature both in the Arches and Admiralty Courts, &c. And in this very Case Henry Pollexfen having obtained Administration de bonis non of his Uncle Andrew in the Country, the now Plaintiff got it set aside by the Delegates, because granted while an Appeal was depending, and that upon full debate before them, who would yet now suggest that the Appeal was determined by the Death of Andrew.

The Court were of Opinion, That no Prohibition was to be granted, and that the Delegates Authority to proceed in that case continued, notwithstanding the Death of Andrew: For the Commission is to proceed in causa Administration', &c. una cum suis incidentibus vel annexis qualiter cunque, &c. summarie & juxta Juris exigentiam. So that the Ecclesiastical Law is appointed to be their Rule, by the course of which a Suit doth not abate by the Death of the Parties.

And Hale said, The Appeal is to the King in Chancery, and it is by reason of his Original Jurisdiction, and thereupon he grants a Commission to hear it. Now if he could hear it in Person, none could object but that he might determine the Cause after the Death of the Parties; and by the same Reason they may, to whom he hath delegated his Authority.

But the Attorney General coming in, and desiring to be heard in it for the Plaintiff, the Court gave further time.

*Eaton versus Barker.*

Ante 133.

**T**HE Case was now moved again upon the Statute, for coming to a Place where he had formerly preached in a Conventicle. And exception was taken to the Declaration,

For that it was not averred, That the Defendant was in Holy Orders: For the Words of the Statute are, That if any one that hath been Parson, Vicar, Lecturer, &c. or within Holy Orders; and have taken upon them to preach, &c.

But to this it was answered, That there is another Clause in the Act, That all such Persons as shall take upon them to preach, &c. which is general and extends to all Men, whether in Orders or no, which have been Preachers. And of that Opinion were the Court.

It was also objected, That there was no Averment: That the Defendant was not thereupon Summons, Subpœna, &c. for if so, then it is no Offence by the Aa.

To which it was answered, That if the Body of the Aa were, That all Persons which should resort to such place, which were not Summoned or Subpœna'd thither, should forfeit, &c. then 'tis true, it must be averred: But that matter comes in a proviso of the Aa, (viz.) That it shall not extend to such Cases; and therefore if there were any such thing, the Defendant is to plead it.

Wherefore the Court ordered Judgment to be entered for the Plaintiff. Ante 133.

Anonymus.

**I**N an Action of Trover and Conversion: After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Action was commenced in Hilary Term, and the Conversion alledged to be the 3d of February in the same Term; and the Bill filed relates to the first Day of the Term, so before the Cause of Action. 2 Lev. 13.  
2 Keb. 790.

But it was resolved by the Court, That if the Bail were entered after the 3d day of February, it is well enough; for it is that which gives this Court Jurisdiction.

So an Ejectment may be brought upon a Lease made in the same Term: So the Statute of Limitations may be pleaded to an Action, if the time be elapsed before the Day wherein the Bail is filed, tho' not before the first Day of the Term wherein the Action is brought: For the Action shall not be said to be depending until the Bail is filed, And upon search it was found, That the Bail was filed the last Day of the Term.

Putt *versus* Nosworthy.

**I**N Debt, the Plaintiff declared upon certain Articles, whereby the Plaintiff covenanted to convey certain Lands to the Defendant, and in Consideration thereof the Defendant covenanted to pay a certain Sum to the Plaintiff. Ante 34, 76.  
2 Keb. 795,  
810.

After a General Impar lance the Defendant prayed Oyer of the Deed, whereby it appeared that the Defendant and one Vincent covenanted, that he or Vincent should pay the said Sum. And he avers, That Vincent sealed and delivered the Deed, and demands Judgment of the Bill, Et si actionem poterit habere versus eum solummodo.

To this the Plaintiff demurred; which was entered thus: Et dicit quod ab actione prædicta præcludi non debet, quia materia insufficientis, &c.

And the Defendant joins, Quod materia præallegat' sufficiens, &c. prædict' le Plaintiff ab actione prædict' præcludere.



Jones moved for the Plaintiff, That the Defendant's Plea being in Abatement, could not be admitted after an Imparllance, and that a peremptory Judgment ought to be here given; because he had concluded in Bar, as well as Abatement. For he doth not only demand Judgment of the Bill, but he saith, actionem habere non debet; and the Demurrer is joined as upon a Plea in Bar.

And it was agreed, That if a Man concludes a Plea in Abatement, as in Bar; if it be against him that pleads it, Judgment peremptory is to be given. But here the Conclusion is not actionem habere non debet; but 'tis added, versus eum solummodo. So if a Man begins a Plea in Abatement, actio non, &c. Judgment peremptory ought to be thereupon given.

But then it was said, That although it were too late to urge this Matter in Abatement; yet it appeared upon the Deed shewn, That the Plaintiff's Declaration was insufficient: For it being, If the Defendant, or one Vincent should pay; and the Plaintiff alledging, that the Defendant had not paid, is not enough to intitle him to his Action, albeit that Vincent were no Covenantor, or had ever sealed and delivered.

To which it was answered, and so resolved by the Court, That it appeared by the frame of the Deed, that Vincent was as well Party, as the Defendant; and it is too late now to aberr, that he did seal and deliver; so it shall be taken that he did not, and then it remains the sole Covenant of the Defendant.

And though the Words are, That the Defendant or Vincent shall pay; that is no more than the Law would have implied, if Vincent had sealed.

Postea 162.  
2 Keb. 795.

And the Chief Justice cited one Cartwright's Case, in Debt for Rent, where the Indenture of Lease was a Demise from Cartwright, and another Joint-tenant with him, reserving a certain Rent to them both; but the other never sealed. Cartwright brought Debt, and declared of a Demise of the Moiety, and Reservation of the Moiety of the Rent. And upon Nil debet the Matter aforesaid was specially found: And it was moved,

First, That the Lease being by Indenture, Whether the whole Rent were not well reserved to Cartwright, as by Estoppel; or whether it were not good to him, as to a Stranger, for one Moiety; or whether it should not be good to him as an intire Thing, which was reserved to him as well as the other.

But the Court resolved, That it was good only for a Moiety as he had declared: For there being an Expectation of the other's Sealing, which never was done, the Deed, as to one Moiety of the Land, and the Rent reserved, had no effect. And where one declares against one upon a Deed, whereby it appears that another was bound with him, it shall not be intended that the

other

other sealed, unless averred on the Defendant's Side. Otherwise where the Declaration is upon Matter of Record.

And it was held by the Court, That if the Declaration were defective in this, yet it was but in Matter of Form: For he saith, That the Defendant did not pay, sed adhuc injuste detinet, which is an Averment, tho' unformal, that the Money is not yet paid neither by the one nor other. And so it hath been held, where in Debt against the Executor it is averred, That the Executor did not pay it, & adhuc injuste detinet, and not averred, that the Testator had not paid in his Life-time, that after a Verdict this is aided.

And they held, That a Judgment ought to be given quod respondeat ouster; for the joining Demurrer as upon a Plea in Bar, is not material; besides the Fault begun on the Plaintiff's part. Ante 77.

Tailour *versus* Fitzgerald.

**E**RROUR upon a Judgment given in the King's Bench in Ireland, <sup>2 Keb. 796.</sup> in Ejectment; where the Plaintiff declared, That J. S. demised to him per quoddam Scriptum obligatorium, &c. habend' a die datus Indenturæ prædictæ.

And upon Not Guilty pleaded, it was found for the Plaintiff, and he had his Judgment.

It was assigned for Error, That there was no time when this Lease should commence; for it was Habend' after the Date of the aforesaid Indenture, and there was none before, it being Scriptum obligatorium, and not Indenturam.

But the Court resolved, That the Writing should be intended an Indenture, and tho' called Scriptum obligatorium, which is improper; yet it may be said every Deed obligeth, or if it shall not be intended Indented, then the Lease shall commence presently, as if it had been Habend' from the 40th of September. <sup>Ante 83, 84. 183, 184.</sup>

Crossing *versus* Scudamore. Trin. 22 Car. 2. Rot. 871. in Banco Regis.

**I**F Trespass, Quare clausum fregit, the Defendant pleaded, that <sup>1 Mod. Rep. 175.</sup> the place Where was the freehold of Sir Thomas Hooks, and that by his Command he entred. <sup>Carter. 137.</sup>

The Plaintiff traverseth, That it was the Freehold of Sir T. H. <sup>2 Vent. 318.</sup> And thereupon this Special Verdict was found. <sup>2 Keb. 754, 784.</sup>

That Nicholas Heale was seised in Fee, and that <sup>16 Dec. 1640.</sup> he made a Deed to Jane Heale, enrolled within six Months, by which the said Nicholas did (for and in Consideration of Natural Love, Augmentation of her Portion, and Preferment of her in Marriage, and other good and valuable Considerations) give, grant, bargain, sell, alien, enfeof and confirm unto the said Jane Heale, and her heirs. Then they found there was a Covenant, that the <sup>2 Lev. 9.</sup> <sup>3 Lev. 372.</sup> said



said Jane Heale should, after due Execution, &c. quietly enjoy, &c. and also a special Clause of Warranty. And that the Deed was enrolled within six Months, and that there was no other Consideration of making the Indenture than what was expressed. And if it were sufficient to convey the Premises to the said Jane, they found for the Plaintiff; if not, for the Defendant.

And it was argued by Winnington for the Plaintiff. He agreed that it could not take effect as a Bargain and Sale, because no Money was paid; but argued, that the Deed should enure as a Covenant to stand seised.

It is a Ground in the Law, That the Intention of the Parties ought to guide the raising of Uses, and the Construction how they shall enure. Co. Lit. 49. Roll. 2d part 789. and to give the Effect the Words shall be disposed to other Construction than what otherwise they would import. As if a Man demises, grants and to Farm lets certain Lands in Consideration of Money, and the Deed is enrolled; this is a good Bargain and Sale. So if a Man covenants in Consideration of Money, to stand seised to the use of his Son. 8 Co. 93. Fox's Case, 2 Roll. 789. It is said, *Nora per Cur'*, if it appears that it was the Intent of him that made the Deed, to pass the Estate, according to Rules of Law, it shall pass though there be not formal Words.

Again, The Consideration expressed in this Deed, is purely applicable to a Covenant to stand seised, and a Deed shall enure upon the Consideration expressed rather than upon one that is implied. As in Bedell's Case, 7 Co. 40. If the Father, in Consideration of 100 l. paid, covenants to stand seised to the Use of his Son, and the Deed is not enrolled, nothing shall pass: But where there are two Considerations expressed, there the Use may arise upon either. As if the Father in Consideration of Blood and 100 l. paid by the Son, covenants to stand seised, &c. and the Deed is not enrolled; yet the Use shall arise, as upon a Covenant to stand seised. Pl. Com. 305. And so it was adjudged between Watson and Dicks in the Common Pleas, 1656. The Father by Deed in Consideration of Love and 100 l. paid by the Son, conveyed Land to him, with a Letter of Attorney in the Deed to make Livery; in that case the Son hath his Election to take by the Enrolment or Livery, which shall be first executed. 2 Roll. 787. pl. 25.

But it hath been objected here, That there is a Clause of Warranty in the Deed, which shews that the Parties intended a Conveyance at the Common Law; for if it enure by way of Covenant to stand seised, the Warranty can have no effect but to rebut. Also there is a Covenant for quiet Enjoyment after Sealing and Delivery of the Deed, and due Execution of the same; which

which shews the Parties had a prospect of Executing it by Liberty, &c.

To which he answered, That such remote Implications as those shall never make a Deed void against an express Consideration, upon the which an Use may arise. 'Tis true, if there had been a Letter of Attorney in the Deed, it might have been void, unless Liberty had followed. As if the Father by Deed grants Land to the Son, and a Letter of Attorney in it to make Liberty; if none be made, nothing passes. Co. Lit. 40. a. The Authorities which have been cited on the other side are, first, Pitfield and Pierce's Case, 2 Roll. March Rep. 789. where the Father by Deed Poll, in Consideration of Blood, 53. did give, grant, &c. (as in our Case) to his Son, Habend' after his decease, and a Proviso in it, That the Son should pay a Rent during the Father's Life.

It was adjudged, That the Lands should not pass in that Case by way of Covenant to stand seised. But in that Case the Conveyance was repugnant to the Rules of Law, for that it was Habend' the Land after the Death of the Grantor, and also repugnant in it self. For notwithstanding that it reserves the Land to the Father during his Life, yet it provides for a payment of Rent to him; wherefore the Law would not help out a Deed so contradictory and repugnant by way of raising an Use.

The other Case relied upon, is between Foster and Foster, Hill. 13 of this King, in this Court, in Ejectment. The Case was; The Mother, for divers good Considerations and 20 l. paid, did by a Deed which was entitled, Articles of Agreement, demise, grant, bargain, sell, assign and set over, to the Son and his Heirs for ever, certain Lands; the said Margery the Mother quietly enjoying the Premises during her Life. 1 Lev. 55.  
1 Sid. 82.  
Raym. 43.

The Court resolved, That it should not amount to a Covenant to stand seised; for they were but intended as Articles of Agreement, and preparatory for a further Conveyance. So the Case differs very much from ours, as also that it reserves the Land to the Mother during her Life.

The Case also of Osborn and Bradshaw in 2 Cro. 127. hath been cited, Where the Father, in Consideration of Love which he bears to his Son, and for natural Affection to him, bargained and sold, gave, granted and confirmed Land to him and his Heirs; the Deed was enrolled. It was held, The Land should not pass unless Money had been paid, or the Estate executed. This Case cannot be urged as any great Authority; for it appears that the Son was in possession. Therefore the Court adjudged, That the Deed should be a Confirmation: And it being clear that way, they had not much occasion to insist upon or debate the other Point. And he relied upon Debb and Peplewell's Case, as an Authority in the Point. 2 Roll. 786. where there was a Clause of Warranty in



the Deed, and an Enrolment within six Months, as in the Case at Bar: But they resolved there, If a Letter of Attorney had been in the Deed, it should not have been construed a Covenant to stand seised; and therefore he prayed Judgment for the Plaintiff.

Raym. 4 6.  
1 Sid. 26.

Finch, Attorney General, contra. The Lands here cannot pass by Bargain and Sale, there being no Money paid, which I find is admitted by the other side; neither shall it amount to a Covenant to stand seised. There are five Things necessary to raise an Use by way of Covenant:

First, A sufficient Consideration.

Winch. 59,  
60.

Secondly, A Deed; as in Callard and Callard's Case, in 3 Cro. and in Popham's Reports; and hath been often resolved since.

Thirdly, A Seisin in the Covenantor, of the Lands at the time of the Deed: For a Man cannot covenant to stand seised to an Use, of Lands which he shall after purchase.

Fourthly, A clear and apparent Intent,

Fifthly, Apt and proper Words. And the two last things are wanting in our Case.

1 Mod. 178.

I agree, the Word Covenant is not necessary, so there be other Words sufficient in Law, and to declare the Party's Intent; for all Words will not serve. A Man covenanted upon good Consideration, that his Feoffees should stand seised: It was resolved, That no Use should arise upon it, 1 Cro. 856. So Sir Thomas Seymour's Case, Where a Covenant was upon good Consideration to levy a fine to certain Uses, and no fine was after levied: It was resolved, That the Covenant did not raise any Use, Dyer 96. Therefore 'tis usual to express in such Deeds of Covenant, that if the Conveyances therein contained be not executed, that then the Party shall from henceforth stand seised. And where it is said in Vivian's Case, Dyer 302, One having given, granted and released to his Brother and his Heirs certain Manors, and no Livery made, that Plowden would have averred that the Deed was made pro fraterno amore, and so should raise an Use; under the Favour of the Court I deny that Opinion of Plowden to be Law. And in Debb and Peplewell's Case it is said, That the Land was enjoyed against the Release. And in Moor, pl. 267, One covenanted in Consideration of Marriage, to let his Land descend, remain or come to his Daughter: It was resolved, No Use did arise thereupon.

Winch. 61.

In this Conveyance there are not any Words that sound in Covenant; the only Word that looks towards an Use is the Word Bargain and Sell. And in Ward and Lambert's Case, in 3 Cro. 394, it is held, That if one gives, or bargains and sells Land to his Son, it shall not amount to a Covenant to stand seised, for want of apt Words.

Now

Now the other are all words of Common Law, Give, Grant, Alien, Enfeoff and Confirm. There is also a clause of Special Warranty in the Deed, and a Covenant to make further Assurance by Fine, Recovery, &c. as great a Preparation at Common Law as could be. And if the Parties intend the Land shall pass at the Common Law by Transmutation of Possession, there shall no Use arise. Co. Lit. 49 Charter of Feoffment to the Son, it shall raise no Use if no Livery be made.

The Word Dedi in this Deed imports a General Warranty, which is not qualified by the Special Warranty after; yet if the Land pass by way of Covenant to stand seised, there can be only a Rebutter, and so no use of the General Warranty. The Authorities since have not been concurrent with Debb and Peplewell's Case, but contrary to it. And I rely upon the Cases of Pitfield and Pierce, and Forster and Forster in this Court, which have been remembered on the other side, but not answered. And whereas it is said, That the Habend. is after the Death of them which conveyed the Land; they are in that respect stronger than the Case at Bar; for by that it appears, they could not intend a Conveyance at the Common Law, which doth not allow such kind of Limitations, therefore it must be by way of Use, or no way: yet it was resolved they should not pass so.

It would introduce universal ignorance and carelessness, in such as draw Conveyances, if the Court should apply their Art to give them effect, however they were penned, and it is a Rule, *Politia legibus, non leges politica adaptantur.*

The Court after the hearing the Case twice argued, were all of Opinion, That the Land should pass by way of Covenant to stand seized; and Hale cited Hob. 277, who doth there commend the Judges who are curious, and almost subtil to invent Reasons and Means to make Acts effectual, according to the just intent of the Parties.

They all held clearly, That Words proper for a Conveyance at Common Law would raise an Use, as Demise and Grant have been adjudged to amount to a Bargain and Sale without other words; And they said Pitfield and Pierce's Case was adjudged upon the absurd contrivance of the Conveyance, and so Forster and Forster's Case in this Court; and for that in that case the Deed was Articles of Agreement, preparatory to what the Parties intended after, and the case in Moor, Pl. 267, where there was a Covenant in Consideration of Marriage, to suffer the Land to remain, descend or come to the Daughter; no Use did arise there, for the Incertainty how it was intended the Daughter should take.

2 Vent. 318,  
149, 260,  
266.  
1 Mod. 178.



And they said, That if they should not construe an Use to arise by such Conveyance, as in the Case at Bar, it would overthrow all Conveyances by Lease and Release.

And for the Objection of the Warranty in the Deed, it is well known there is so in most Conveyances to Uses. Wherefore they gave Judgment for the Plaintiff.

1 Mod. 175,  
179.

Note, This Judgment was afterwards affirmed upon Error brought in the Exchequer Chamber.

Anonymus.

**A**n Indiamment was brought, for using of a Trade to which he had not been bound an Apprentice.

It was moved to quash it, because it was not alledged, That he did use the Trade, 5 Eliz. for if he did, he is excepted out of the Statute.

But the Court did not much regard that Exception, tho' they said it had been often allowed; but it cannot here be intended, it being so long since the Statute was made.

Secondly, It was for using the Trade Aromatarii, without an Anglice; so it could not be known what Trade was meant, and tho' that Word is often used for a Grocer, yet it must be so Englished, or else it shall not be taken for that Trade more than another.

And for this Cause, the Court quashed the Indiamment.

Raym. 58.  
1 Sid. 90;  
1541

Note, If a Man be taken up on a Warrant de securitate pacis or any criminal Cause, he is not to be charged with Actions, unless the Court gives leave, which they will rarely do.

The Case of the Heirs of the Earl of Southampton.

2 Keb. 806.

**K**ing James by his Letters Patents enrolled in this Court, granted to the E. of Southampton, all Deodands within the Manor of Ditchfield.

An Inquisition was certified here, That a Deodand was forfeited within the said Manor, and Process went out thereupon.

Vid. Stat.  
4 & 5 W. &  
M. Car. 22.  
which directs how  
these Grants  
shall be  
pleaded.

The Court were moved in behalf of the Daughters and Heirs of the Earl, whether they should be driven to set forth their Title in pleading; for if so, the Charges would far exceed the Value of the Deodand, and it would be very inconvenient, that every new Heir should be forced to plead upon every Deodand that happens.

But the Court said, In regard the Letters Patents are here enrolled, and that it appeared by the Inquisition, that this Deodand was forfeited within the Manor, it should suffice without pleading, if the Heirs satisfied the Office of their Title without pleading; as where Comulance of Pleas have been once allowed, it is sufficient

ent in another Action to shew the former Roll where it was allowed.

Nota. An Indiamment for a Nuisance in the Highway. The Court will not quash this Indiamment upon Motion, unless certified that the Nuisance is removed.

But they will reverse it upon a Writ of Error, (if there be Error in it) without any such Certificate.

#### Ile's Case.

**A** Mandamus was prayed to the Churchwardens of the Parish of Kinsmere in Hampton, to restore John Ile to the place of Sexton there, and it was granted. Pollea 153.  
Raym. 211.  
2 Keb. 802,  
807, 820.

And so the Court said it hath been for a Parish-Clerk, Churchwardens, and a Scavenger. 3 Mod. 335.  
2 Sid. 112.

But it was denied to one, who pretended to be Master of the Lord Mayor's Waterhouse; for that they said was not an Office, but a Service. 2 Sid. 112.  
2 Lev. 18.

#### Anonymus.

**A** Fine was levied of Lands in Blandford Forum.

Resolved, That this should not pass Lands in a Hamlet of that Town, there being Constables distinct in Blandford Forum from others that were in the Hamlet; so that they were as two Villages. 2 Mod. Rep.  
from 233 to  
239. 47, 49.  
Pollea 170,  
171.

But if a Fine be levied of Lands in a Parish, it shall extend to all the Villages within the Parish. 2 Ventr. 31.  
2 Cro. 120.  
1 Mod. 78,  
117, 118,  
206.

#### The Lord Hawley's Case.

**A** Mandamus was granted to restore him to the Recordership of Bath. 2 Keb. 770,  
796.

The Corporation returned, That they were incorporated by Letters Patents of Queen Elizabeth, which empowered them to chuse probum & discretum hominem in legibus Angliæ peritum to be their Recorder, and to hold a Court twice every Week before the Mayor, Aldermen and Recorder, or any two of them, whereof the Mayor to be one.

That the 1st of August 15th of this King he was made Recorder by the Committee, upon the Act of this King for regulating of Corporations; and that he continued in the Office secundum locationem illam until the 25 of December 21 of the King, and that from the 1 of August 15th of the King to August 21, he absented himself by the space of five Years without any reasonable Cause, and that he is nullo modo peritus in lege; and that at a Court August the 21, they



they summoned him to appear some days before, and he not coming, they removed him from his Office, the 30 day of the said August.

After this Return filed it was moved,

First, That it was repugnant, for they returned, That the Lord Hawley continued in his Office until the 25 of December 21 of the King, and after that they removed him in August 21 of the King. To which it was answered, That in regard upon the whole Return it appears, that he was removed, though it be said he continued after, that is not material but Surplusage: As where a Jury gives a general Verdict, and yet discloses special Matter disagreeing to it; the Court judges according to the special Matter; or else they might mean that though he were turned out, yet he did continue exercising it de facto. And the Court were of Opinion, That the Contradiction in the Return was not material: For Hale said, If it shall be taken that he is yet in, then there is no need of a Mandamus.

Again, it was said, That the Matter of Absence was not sufficiently returned; for it appears by the Charter, that the Presence of the Recorder is not necessary to the holding of the Court; for it is to be held before the Mayor, Aldermen and Recorder, or any two of them, whereof the Mayor to be one. Then they have not returned, that they held a Court in all that time, neither have they returned, that any Mischief, or Inconvenience happened to them by his Absence.

A Park-keeper shall not forfeit his Office for Non-attendance, unless a Deer be killed, or the like, in his absence. Also it is returned from the 1 of Aug. 15 Car. to the 1 of Aug. 21. he absented himself for five Years, and he might be out of Town five Years in six Years time, and yet be there every Court-day.

And for the other cause of Removal, that he was not peritus in lege; it was said, That the Corporation being Laymen, could not return a thing whereof they were not Judges: That the Return was too general, nullo modo peritus; but ought to have set forth some special Fact, whereby it might appear to the Court.

Also, They could not remove him for a Cause which they could not examine, he was put in by Commissioners, authorized by Act of Parliament, which it was said did capacitate implicitly him, at least their Act supplied the Election of the Town, which if it had been, would have dispensed with his Disability. And the Case of Bernardiston, Recorder of Colchester was much relied upon, who in 1655, brought a Mandamus to be restored to his Office. And it was returned, That he was not learned in the Law, and that one being indicted before him, upon the Statute of 1 Jac. of having two Wives, and convicted, he denied him Clergy;

Clergy; and also they returned, That he absented himself for nine Months; and notwithstanding, by the Judgment of the Court he was restored.

It was said by Sir William Jones on the other side, That the Absence as it was returned, was a sufficient Cause to remove him; for it is returned, That without any reasonable Cause seipsum elongavit by the space five Years, which must be intended five Years continued, and not made up by Fractions; (and so held the Court in that Case) and executionem officii sui totaliter neglexit: Now, tho' his Presence be not of absolute Necessity to the holding of the Court, yet it is highly convenient that he should be there, seeing the Charter gives such large Jurisdictions, to determine all Causes, (excepting such as concern Freehold) according to Law.

The Court here also must judicially take notice, That the Office of Recorder is concerned in other matters, besides the Administration of Justice in the Court; for he is as it were the Common Counsel of the Corporation.

And whereas it hath been objected, That it is not returned, that they had held a Court during his Absence, or that any Prejudice had ensued.

Also, That it must be intended that there were Courts, when they have returned the Charter, which empowers them to hold one twice every Week; and 'tis returned, That he absented himself in regiminis civitatis detrimentum, &c. and it's apparent they must suffer Prejudice by his so long Absence. If a Park-keeper should desert his Office for five Years, it would make a Forfeiture without Special Damage.

The other matter returned also, That he is nullo modo peritus in lege, is good Cause; for the Charter appoints them to elect such an one; so that one who is not so qualified is not capable, and the Act of this King authorises Commissioners but to do what the Corporation might have done.

It is apparent, That the Office requires an Officer who hath skill in the Law; he hath no power to make a Deputy by the Statute of 31 Jac.

Cases in many Cases are not to be removed out of Corporation Courts, where they are held before an Alder Barrister; so that 'tis far better for the Corporation to have such an one their Recorder, Style 452.

Twisden said, The case of Bernardiston differed, (besides that, he apprehended he had much of the favour of the Times in it,) for he that was tried before him for having two Wives, was arraigned before him, not as Recorder of Colchester, but as a Commissioner of the Gaol-delivery; neither was it returned, That he was summoned, which was said not to be material, because they could not have examined the matter. It was returned also, That he absented himself for nine Months; but not set forth that



any Court was held during that Time, or any Occasion for it. He said, That Cholmley, Recorder of Lincoln, was turned out of his Place, for trying the Accessary before the Principal; and altho' there be no Special Find returned here, yet it may be tried in an Action upon the Case.

The Court said, They would look upon Bernardiston's Case. Et adjournatur.

Anonymus.

Postea 343.  
Lev. 60.  
2 Keb. 779.  
Raym. 3.

**A** Prohibition shall not go to the Admiralty to stay a Suit there for Mariners Wages, tho' the Contract were upon the Land. For,

First, It is more convenient for them to sue there, because they may all join.

Again, according to their Law, If the Ship perish by the Mariners Default, they are to lose their Wages; therefore in this special Case the Suit shall be suffered to proceed there.

Dier *versus* East.

3 Inst. 177.  
Dyer 275.  
3 Cro. 680.

**W**here by the Statute of E. 6. it is ordained, That striking in the Church-yard shall be Excommunication ipso facto; this tho' it takes away the necessity of any Sentence of Excommunication, yet he that strikes doth not stand excommunicated, until he be thereof convicted at Law, and this transmitted to the Ordinary.

Theodore Morris's Case.

2 Keb. 724.  
797.

**H**e was indicted of Murder in Denbigh, and obtained a Certiorari to remove it into this Court, in order to have it tried in an adjacent English County.

And it was moved whether by Law it might be?

The Statute of 26 H.8. cap. 6. empowers the next English County to take Indictments of Treasons and Felonies committed in Wales, and to try them; but here the Indictment was taken in a Welsh County. Herbert's Case in Latch was cited, who was indicted at Montgomery, and tried at Salop; and Plowden, Matters del corone avenants a Salop; and Southley and Price's Case, 3 Cro. is, That the Statute doth not extend to a Trial upon an Appeal. In Chedley's Case a Certiorari was granted, as here, to remove an Indictment found in Anglesey, which was afterwards tried in the next English County. 3 Cro. 331.

And the Court held, that so it might be here. Ante 93.

Large *versus* Cheshire.

**H**ILL. 22 & 23 Car. 2. Rot. 520. In Covenant the Plaintiff <sup>2 Keble 801.</sup> declared upon Articles of Agreement, between him and the Defendant, whereby the Defendant covenanted to pay him such a Sum, the Plaintiff making to him a sufficient Estate in such Lands before the feast of St. Thomas next ensuing the date of the Deed; and then he saith, That licet he the Plaintiff, semper a tempore confectionis scripti paratus fuit ad performand' all the Agreement of his part usque ad diem exhibitionis billæ, the Defendant had not paid him the Money.

The Defendant pleaded, quod ipse obtulit solvere the Money aforesaid, apud Derby, si le Plaintiff faceret ei bonum & sufficient Statum de & in Præmissis. &c.

The Plaintiff replied, Protestando that the Defendant did not offer the Money; pro placito that he the 21 of Decemb. apud Derby fecit & sigillavit quandam Chartam Feoffamenti, whereby he conveyed the Premises to the Defendant, and that he came to the Premises an hour before Sun-set the same day, paratus ad deliberand' seisinam, &c. & quod Defendens nec aliquis ex parte illius venit ad recipiend', &c. to which the Defendant demurred, and adjudged for him.

It was held, That these Words, ipso faciente bonum statum, were a Condition precedent to the Payment of the Money; therefore the Plaintiff in his Declaration should have averred the Performance of it particularly. and not by such general Words, that he had done all on his part.

And it differs from the Case, where in Assumpsit the Plaintiff declared, That the Defendant in Consideration the Plaintiff should permit him to enjoy such Land for seven Years, that he would pay him pro quolibet anno 20 s. and the Action was held well brought within the seven Years, for that it was an Executory Contract for every of the Years, according to the Intention of the Parties.

It was resolved also, That the Replication was insufficient; for that the Plaintiff having Election to make what Conveyance he pleased, he ought to have given Notice to the Defendant, that he would execute this Charter of Feoffment by Livery, for it might have been by Enrollment. But Hale said, the time When in this Case was not necessary to be in the Notice, because the Charter was sealed and delivered upon the extream Day limited by the Agreement, so the Defendant knew it must be upon that Day; so for the Place, because it is a local thing, and must be done upon the Land.



But because he had set forth no Notice given to the Defendant, that he would make Livery, the Replication is insufficient; as if a Man be bound to levy a Fine, he must shew whether he will do it in Court, or by Dedimus; and the Court said, If the Defendant had refused to accept of Livery, the Plaintiff might as well have brought the Action as if he had actually made it.

Sacheverel *versus* Frogate.

Postea 161.  
2Saund. 367.  
Raym. 213.  
2Keb. 798,  
819, &c.  
2 Lev. 13.

**I**N Covenant the Plaintiff declares, That Jacinth Sacheverel was seized in Fee, and demised to the Defendant certain Lands for 21 Years, rendering to him, his Executors, Administrators and Assigns 120 l. annually during the Term: By force of which Lease the Defendant entered, and that J. S. devised the Reversion to the Plaintiff, and died; and for Non-payment of Rent accrued since his Death he brought the Action, and to this Declaration the Defendant demurred.

And it was argued by Winnington, That the Rent determined by the Death of the Lessor, as where the Lessor reserves the Rent only to himself, 1 E. 4, 18. 27 H. 8. 19. Dyet 45. Com. 171; the Heir shall not have it; for Reservations are taken strongest against the Lessor; so where the Reservation is to the Lessor, his Executors and Assigns, it continues but for his Life. 1 Co. Lit. 47. a.

This is true, Here is also added durante Termino; and in Mallo-ry's Case, 5 Co. where the Reservation was to the Abbot, or his Successors during the Term, it went to the Successor; but that was because they expounded the Word, OR, as a Conjunctive, for if Successor had been left out, I suppose it would have been resolved otherwise. Richmond and Butcher's Case, 1 Cro. 217, is in Point, That the Heir shall not have it. So 2 Roll. 451. and Doderidge gives the Reason, That the Party by his Words has abidg'd what otherwise the Law would make; and so it is held in Bland and In-man's Case, 3 Cro. 288; where a Man possessed of a Term for 100 Years, did join in a Lease with his Wife, solvendo so much Rent during the Term to him and his Wife, and the Survivors of them; that the Executors should not have this Rent.

Hunt contra. In the Reservation of a Rent, there is no need of words of Limitation: If the words are Pledging and Paying generally, without saying to whom, it is a good Reservation to all those to whom the Reversion shall come; so if two Joint-tenants reserve a Rent generally, it is good to both.

Here are sufficient Words to declare the Intent that the Rent should continue, and then they shall not be restrained by any affirmative Words after; and where Executors, Administrators and Assigns are named, that shall be taken as an Enumeration of some Particulars, without any Intent to exclude others; as where

a Man made one his Executor of all his Corn and moveable Goods; this gave him an Interest as Executor in all his Chateaux, as well as in those which were named. 3 Cro. 292. Rose and Bartlet's Case. 6 Co. Whitlock's Case. If the Reservation be to such Persons to whom the Reversion shall come, this is good to the Heir and all others. If a Lease be made, excepting a Chamber to the Lessor; this remains excepted after the Death of the Lessor. 7 H. 8. 19.

Hale. If this were *res integra*, it might be a strong Case for the Plaintiff; but the Authorities go the other way. *Sed adjournatur*. Vide postea 161.

## Termino Sancti Michaelis, Anno 23 Car. II. In Banco Regis.

*Dorrel versus Jay.*

**T**he Plaintiff declared, That Communication being between Ante 117.  
J. S. and the Defendant, of the last Will of John Rowe, Esq; deceased, That the Defendant said of the Plaintiff, He hath forged his Uncle Rowe's Will.

After Verdict for the Plaintiff it was moved by Serjeant Ellis in Arrest of Judgment, That it is not averred that John Rowe was dead at the time of the speaking of the Words. *Sed non allocatur*;

For it is said, there was a Discourse of the Will of John Rowe Ante 117.  
Esquire defuncti, and there defuncti goeth to the description of his Person, and expresseth that he was then dead, and not only when the Action was brought.

Besides, the words imply it; for if he were not dead, he could not forge his Will. Vide ante, Philips and Kingston's Case, Pasch. 23 Car. Ante 117.

## The Case of St. Katherine's Hospital.

**T**he Case, as it appeared upon the Evidence at a Trial at Bar in Ejectment, for part of the Lands of the Hospital, between T. Jones.  
the Lessee of Sir Robert Atkins the Queen's Solicitor, and George 176.  
Mountague Esquire, was this. 2 Keb. 808.

Elianor, Queen Dowager of Henry the Third, in the Year 1273, founded (or at least amply endowed) this Hospital, reserving to her self during her Life, & Reginis Angliæ nobis succedentibus,  
the



the Nomination of the Master to this Hospital; which was incorporated, and the Grants to it confirmed by the King's Letters Patents.

In the Year 1660, Henrietta Maria, Queen Mother, granted the Mastership of this Hospital to H. Mountague for Life; and the King in the same Year reciting his Mother's Grant, and that the Right of it belonged unto her, confirmed it by his Letters Patents; and did further by the same Letters Patents grant unto the said H. M. the said Mastership.

Afterwards the King married Katherine the now Queen Consort, and she granted the Mastership to Sir Robert Atkins for his Life.

It was urged on the part of the Plaintiff, That the Right of appointing the Master was only in the Queen Consort; for Queen Elianor reserved it to her self and her Successors, Queens of England; and Queen of England is not Queen Dowager, but Queen Consort. And tho' Land cannot be limited to descend in such manner without Act of Parliament, as is resolved in the Prince's Case in 8 Co. yet such a Desultory Inheritance (as this was called) may be created of a thing de novo: As a Rent may be granted and appointed to cease during the Minority of the Heir; or upon the first Foundation of a Church, the Patronage may be reserved to A. and if he presents not within four Months, then to B. So in the Book of E. 3. it was limited, that the Chapter should present while the Deanry was vacant. And to prove that this Clause had been construed only to intend the Queen Consort, a Record was shewn of a Case between Luttrell and Basse, in 4 E. 3. where

Luttrell exhibited a Petition to the King, which was intitled, To our Lord the King and his Council. Which Petition was sent into the King's Bench under the Great Seal, in which Luttrell sets forth, That Queen Isabel, Mother to Edward the Third, had granted him the Mastership of the Hospital for his Life, and that he was disturbed by Basse; and Process was issued out against Basse, who appeared and pleaded a Grant from Queen Philippa, Wife to Edward the Third; and a Writ came from the King, reciting That the Nomination of the Master did belong to Queen Isabel, And so three Writs more came after to the same purpose, and expressing that the Matter was delayed ad inestimabile damnum Consortis nostræ; And in that Record, Isabel (tho' living) is styled nuper Regina, and Luttrell that claimed under her was barred.

On the other side, Divers Grants were produced during the time that there were no Queens, by the King, and sometimes by a Queen Dowager, during the time that there was a Queen Consort, And these Points following were agreed by all the Court.

First, That an Inheritance might be limited in this manner in a thing de novo.

Secondly, That this Reservation being to Queen Elianor, and her Successors, Queens of England, did not exclude Queen Dowagers, and extend only to Queen Consorts. For,

1. A Dowager Queen is Queen of England, and (as Hale said) hath the Privilege to sue in the Exchequer.

2. When once she is so qualified as to have the Estate vest in her, it shall continue, tho' she doth not remain in the same Capacity.

As where one hath power to limit an Estate to his Wife, it may very well continue in her after the Coverture.

Thirdly, It was much observed and relied upon, That Queen Elianor was only Dowager at the time of the Foundation, and so could never be intended to exclude such Queens as should succeed her in that Capacity.

Fourthly, During such time that there should be no Queen, it was held, That the King was to constitute the Master; for he is heir to Queen Elianor. And whereas it was urged for the Plaintiff, That the King had not Power to dispose of the Place, but only by way of Provision till such time as a Queen should be; so as to commit the Care of the Power to one, but not the Interest of the Mastership;

It was clearly resolved, That the King might grant it, and that the Estate of the Grantee should continue, tho' the King's Interest devolved upon the succeeding Queen. And it was resembled to the Case of the Duchy of Cornwall: If the King, while there is no Prince of Wales, makes a Lease of Lands belonging to that Duchy, this shall determine upon the Birth of that Prince; but if he presents to a Church, the Incumbent shall not be removed; as in case where the King presents to a Church by reason of the Temporalities of a Bishoprick, the Bishop after created shall not remove the Clerk.

And the Chief Justice said in this Case, That the Interest of the Mastership did not properly pass from the King, so as it should have a Dependence upon the King's Estate; for the King doth but nominate, and the Master is intitled as from the first Foundation and Constitution.

It was further agreed, That a thing of this nature could not be granted in Reversion; for it is not like an Office, but rather as a Prebendary or Incumbency of a Church; and the Master, as Head of the Corporation, with his Brethren, hath the whole Estate in him.

As to the Record in 4 Ed. 3. it was said, and so shewn out of Speed's Chronicles, produced in Court, That at that time Queen Isabel was under great Calamity and Oppression, and what was then determined against her was not so much from the Right of the

Note, For  
Evidenoe.



the thing, as the Iniquity of the Times; neither hath it been heard, that one who hath been Queen of England, should be called nuper Regina in her Life-time: So that the Authority was much invalidated from the Circumstance of the Time.

The Plaintiffs observing the Court thus clearly for the Defendant's Title, were Dissuade.

Note, It was not resolved, Whether if there had been a Queen Consort at the time of this Grant, it had been good to the Defendant: But the Judges rather inclined that it should.

*Davison versus Hallip.*

Raym. 211.  
2 Keb. 813.  
Porcea 154.  
2 Lev. 20.

**I**n an Assumpsit the Plaintiff sets forth, That J. S. owed him 20 l. for the Arrent of an Annuity, and that the Defendant was Receiver of the Rents of J. S. and appointed by J. S. to pay the Plaintiff his 20 l.

That the Defendant, in Consideration that the Plaintiff would forbear him ad rem receptor & serv J. S. to such a time, that then he would pay him, if he lived and continued Receiver.

To this the Defendant pleaded non Assumpsit, and a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, That it did not appear that the Defendant had at the time of the Promise any of the Rents of J. S. in his Hands; and then the forbearing of him could be no Consideration, because not liable to any Suit. And tho' in case of an Executor's Promise there need be no Overment of Assets; for notwithstanding that he may be sued, and the Plaintiff may have Judgment to recover when Assets shall come, yet tis not so in this Case. Sed non allocatur.

For it being shewn, That he was Receiver at the time of the Promise, and averred, That he so continued; tis a strong Intendment that he had Effects in his Hands, especially after a Verdict.

It was also said, That the taking of this Promise did not discharge the principal Debtor; but that there might be resort to him so long as the Money was unpaid.

*Brown versus London.*

1 Lev. 298.  
1 Mod. 285.  
Hard. 485.  
2 Keb. 695,  
713, 758,  
822.

**I**n an Action upon the Case, the Plaintiff declared upon the Custom of Merchants, That J. S. drew a Bill of Exchange upon the Defendant, to pay to the Plaintiff; which he accepted, and hath not paid him.

And declared further for Indebitavit upon such a Sum; for that the Defendant accepted a Bill of Exchange from him, &c.

Upon non Assumpsit a Verdict was found for the Plaintiff, and entire Damages given.

And it was moved in Arrest of Judgment, That an Assumpsit sur Indebitatus did not lie upon this matter, but only an Action upon the Case, as it was laid in the first part of the Declaration, where the Custom of Merchants is set forth, and that the Defendant by reason thereof is chargeable; and this is not to be involved in a general Indebitatus Assumpsit.

And of that Opinion were Hale and Rainsford, who said it Hardr. 485, had been so adjudged in the Exchequer since the King's Re- 486. turn.

But they said, If A. delivers Money to B. to pay to C. and gives C. a Bill of Exchange drawn upon B. and B. accepts the Bill, and doth not pay it, C. may bring an Indebitatus assumpsit against B. as having received Money to his use: But then he must not declare only upon a Bill of Exchange accepted, as the Case at Bar is.

So by their Opinions the Judgment was stayed, *hæsitante* Twisden; for he conceived that the Custom made it a Debt for him that accepted the Bill.

#### Hle's Case.

**A** Mandamus was prayed to restore a Sexton. The Court at Antea 143. first doubted whether they should grant it; because he was 2 Lev. 18. rather a Servant to the Parish, than an Officer, or one that had a 2 Keb. 802, freehold in his Place. But upon a Certificate shewn from the 807, 820. Minister, and divers of the Parish, That the Custom was there Dev. 143. to choose a Sexton, and that he held it for his Life; and that he had 2 d. a Year of every House within the Parish; they granted a Mandamus, and it was directed to the Churchwardens.

Twisden said, that it was ruled in 1652, in this Court, That 1 Sid. 40, a Mandamus did not lie to be restored to a Stewardship of a Court 169. Baron, but of a Court Leet it did; for there the Steward is Judge. 3 Mod. 334. but of a Court Baron the Suitors are Judges. Raym. 12.

But Hale said, He was of another Opinion, for the Steward is Judge of that part of the Court which concerns the Copyholds, and is Register of the other. Ante 143.

#### Oble *versus* Dittlesfield.

**I**n an Assumpsit the Plaintiff sets forth, That J. S. was indebted to him in 40 l. and that the Defendant was indebted in the like Sum to J. S. and that J. S. did appoint him to receive this 40 l. from the Defendant in Satisfaction for the Debt due to him from J. S. Which he signifying to the Defendant, he in considera-  
£
tione



trione præmissorum, and that the Plaintiff would forbear him a Quarter of a Year, promised that he would then pay him.

To this the Defendant pleaded non Assumpsit, and a Verdict was found for the Plaintiff.

T. Jones 87.

It was moved in Arrest of Judgment, That here was no sufficient Consideration; for it doth not appear that the Defendant was Party to this Agreement, whereby he should become chargeable by the Plaintiff, and then the Forbearance is not material, and in the mean time he is liable by J. S. his Creditor. And Clipsham and Morris's Case was cited, which was adjudged in this Court, Hill. 20 & 21 Car. 2. where the Plaintiff in an Assumpsit declared, That J. S. was indebted to him in 50 l. and gave him a Note, directed to the Defendant, whereby he required the Defendant to pay him; who upon view of the Note, in Consideration that the Plaintiff would accept of his Promise, and forbear him a Fortnight, promised to pay him the Money. There (after Verdict for the Plaintiff) Judgment was arrested, because that was held no Consideration. Sed non allocatur;

Ante 9, 10.

1 Mod. 12.

1 Saund. 210.  
Ante 152.

Ante 9, 10.

For Hale said, When Assumpsits grew first into Practice, they used to set out the Matter at large, (viz.) in such a Case as this, Quod mutuo agreeatum fuit inter eos, &c. and they should be discharged one against the other; but since it hath been the way to declare more concisely. And upon the whole Matter here it appears, That the Defendant agreed to this transferring of the Debt of J. S. to the Plaintiff; and that it was agreed, that he should be discharged against J. S. And he said, That the Case of Davison and Haslip (hoc Termino ante) was to the same effect: And for Clipsham's Case, that was said to be good in Law; for there it did not appear that the Defendant was at all indebted to him that sent the Note.

Sir William Hicks's Case.

2 Keb. 824.

**D**Ebt was brought against him by the Name of Sir William Hicks, Knight and Baronet.

He pleaded in Abatement, That he was never Knighted.

The Plaintiff moved, That he might amend, and that he had put in Bail by the Name of Knight and Baronet, so that he could not alledge this Matter; which the Court agreed if it were so: But it was found to be entred for William Hicks, Baronet only. So they said, they could not permit any Amendment: but the Plaintiff must of necessity arrest him over again.

Fisher *versus* Batten.

**A** Bill was exhibited in the Dutchy-Court, to be relieved against the Forfeiture of a Mortgage of Lands lying within the County of Lancaster. 2 Keb. 826.  
2 Lev. 24.

The Defendant prayed a Prohibition, surmising, That the Lands in question were not the King's Lands, or holden of him, and therefore he ought not to answer in the Dutchy-Court. And the Court appointed to hear Counsel on both Sides, whether or no this Prohibition were to be granted?

And it was argued by Sir William Jones for the Prohibition, That a Court of Equity must begin by Prescription or Act of Parliament.

That there can be no Prescription in this Case; for both the Dutchy and County-Palatine of Lancaster began within time of Memory. Henry Father-in-Law to John of Gaunt, was the first Duke of Lancaster, and he was made so in Edward the Third's time; and then Lancaster was made a County-Palatine. 4 Inst. 204.

The Act of Parliament upon which this Case must depend, is that of 1 Ed. 4 which takes notice, That the Dutchy and County-Palatine of Lancaster were forfeited to the Crown by the Attainder of H. 6. and enacts, That they shall be separate and distinguished from other Inheritances of the Crown; and appoints a Chancellor for the County-Palatine, and a Chancellor for the Dutchy, and that each should have his Seal; so that the Chancellor of the Dutchy is not to intermeddle in the County-Palatine, which hath a Chancellor of its own for Matters there.

Counties-Palatine had their Original from a Politick Reason, and Lancaster, Durham and Chester were made so, probably because they were adjacent to Enemies Countries; (viz.) the two first to Scotland, and Chester to Wales; so that the Inhabitants having Administration of Justice at home, and not being obliged to attend other Courts, those parts should not be disfurnished of Inhabitants, that might secure the Country from Incursions.

'Tis true, of a long time the Chancellorship both of County and Dutchy have been in one Person; but 'tis the same thing as if there were two, for the several Capacities remain distinct in him.

The first Patent that made it a County-Palatine, ordained that it should have *Jura regalia ad Comitatum Palatinum pertinen' adeo libere & integre sicut Comes Cestrie, infra eundem Comitatus Cestrie dignoscitur obtinere, &c.* So that by that the Jurisdiction ought to be exercised within the County. Com. 215.



They have shewn indeed a multitude of Precedents, but I can hear but of one, for the first Fifty Years after 1 Edw. 4. most of the other are of Personal things; and of the rest, divers began in the County-Palatine, and were transmitted to the Dutchy-Court: As they may send Causes out of the Courts there to be argued in the King's Bench; but doubtful whether the Court here can give Judgment?

They have very few Precedents of Causes which commenced originally in the Dutchy-Court, which is but a Court of Revenue, 4 Inst. The Court of Requests had a multitude of Precedents, but could not thereby gain it self any Jurisdiction, 4 Inst. 97. Holt's Case. Hob. 77. A Bill was exhibited to be relieved against the Penalty of a Bond, which concerned an Extent of Lands within the County-Palatine, and a Prohibition was granted; for the Dutchy-Court is said there to have nothing to do, but with the King's Land and his Revenue. Vide Roll. 317. accordingly.

Weston contra. We cannot pretend to a Court of Equity by Prescription: But we have Precedents for above two hundred Years last past, as well of Bills retained, which commenced originally here, as of those transmitted; and that of Transmission is agreed on the other side, which proves the Jurisdiction. For if a Certiorari, or Corpus cum causa should go out of the King's Bench, Conscience of Pleas might be demanded, and so to stop the removing of the Cause out of the Inferiour Court.

We maintain our Jurisdiction upon the Statute of 1 Ed. 4. before which the County-Palatine and Dutchy of Lancaster were distinct, as they were 1 H. 4. by which A<sup>d</sup> they were both severed from the Possessions of the Crown: But now, 1 Ed. 4. makes one Body of these distinct Bodies, and gives a Superiority to the Dutchy over the County-Palatine; for that is annexed unto, and made parcel of, the Dutchy, as the supream Name of Corporation.

The Words of the A<sup>d</sup> are: That our Liege and Sovereign Lord, King Edward the Fourth, and his Heirs, have as parcel of the Dutchy the County of Lancaster, and County-Palatine: And there is a Chancellor and Seal appointed for the County-Palatine, and a Seal also for the Dutchy, and a Chancellor there for the keeping thereof; and Officers and Counsellors for the Guidance and Governance of the same Dutchy, and of the particular Officers, Ministers, Tenants, and Inhabitants thereof.

So that the A<sup>d</sup> having constituted a Chancellor indefinitely over the Dutchy, and not circumscribing his Power, it is not reason to exempt any part of the Dutchy; and that the County is by force of this A<sup>d</sup>, in the 4 Inst. 119. it is said, That seeing there hath been time out of mind a Chancellor of the Exchequer, that there should be also in the Exchequer a Court of Equity. So the Book of the 2d of H. 8. and Roll. Tit; Prohibition to the Chancery,

That where there is a Chancelloz time out of mind, a Court of Equity follows of Consequence. 4 Inst. 212. it is said, That the Chamberlain of Chester hath the Jurisdiction of a Chancelloz within the County-Palatine of Chester; as the Chancelloz of the Dutchy of Lancaster hath lawfully used and executed within the County-Palatine of Lancaster.

Hale Chief Justice. The County-Palatine of Lancaster is by Act 2 Sid. 146. of Parliament, and therefore Outlawry there is a good Plea in Disability; but an Outlawry in Chester is not pleadable here, for that is a County-Palatine by Prescription.

The Possessions of the Duke of Lancaster were not made a Ducatus, until 2 H. 5. In the Parliament-Roll for that year 'tis entered, Quod sigilla pro Ducatu Lancastriæ allocentur, and that it should be governed per Ministros Ducatus.

By the Parliament-Roll, 39 H. 6. amongst the Tower-Records it appears, That there was appointed a Chancelloz of the Dutchy, an Attorney, Auditor, a Steward, and a General Receiver; also a Chancelloz and the like Officers for the County-Palatine.

So that before the Statute of 1 Ed. 4. there was a Chancelloz of the Dutchy.

I do not think the bare granting of a Chancelloz will incidently give a Court of Equity, nor is such a Court incident to a County-Palatine, tho' there is a general Grant of Jura regalia; but the main matter is upon the Statute of the 1 Ed. 4. which enacts, That the County of Lancaster be a County-Palatine, (which perhaps would have otherwise determined by the Attainder) and that it be Parcel of the Dutchy, and that there be Officers and Counsellors for the guiding of the same Dutchy, and of the particular Officers, Ministers and Tenants, and Inhabitants thereof, in as great, ample and large form, as Henry calling himself King Henry the 5. at any time herein had used and enjoyed lawfully; and further, That in the same Dutchy be used, had and occupied all such freedoms, Liberties, Franchises, Privileges, Customs and Jurisdictions as were used therein lawfully. These words would not of themselves give a Court of Equity, but are relative to what was formerly; and the Precedents that have been produced, are an Evidence that there was such a Jurisdiction exercised before this Act, which is confirmed and established by it.

We have no full Account of its Original, but there are such Prints and Footsteps of it, that we must presume it lawful; or otherwise, 'tis not to be thought that the Act should refer to it. Holt's Case agrees, That they have a Court of Equity, and so as 'tis reported in Rolle. tho' there is a mistake in the Report, where 'tis said, That the Dutchy have no Jurisdiction of such Lands as lie out of the County-Palatine, tho' holden of the King; but possibly they may extend their Jurisdiction too far, when they retain  
Bills



Bills concerning Lands lying out of the County-Palatine, within the precinct of the Dutchy, but not holden. But that matter is not now in question.

I think no Prohibition ought to go in this Case;

First, Because the Statute of the 1 Ed. 4. makes the County-Palatine parcel of the Dutchy.

Secondly, For that the Statute refers to the Jurisdiction formerly exercised, and appoints the Tenants and Inhabitants of the Dutchy to be under the same Regulation. And for that, there are such multitude of Precedents of Proceedings in this nature, (and allowing transmission of Causes yields them a Jurisdiction) for the space of 200 Years, and so many Mens Estates depend upon their Decrees, which have been made with the Assistance of so many Learned Judges, which at all times have been called to assist in this Court, that it would be very unreasonable and inconvenient to unsettle them.

Upon a Quo Warranto the matter might be more strictly examined, than it is fit to do upon a Prohibition,

And Twisden and Rainsford concurred, That no Prohibition ought to go.

It was then objected, That this Bill was not well exhibited, for it was directed Cancellario only; whereas the Court is holden coram Cancellario & Concilio.

Hale said, That would not be material, for in Ed. 1st's time the Style of the King's Bench was coram Rege & Concilio, and the Writ de Ideora examinando, commands the Ideot to be brought coram nobis & Concilio nostro apud Westmon', and anciently Bills were so directed in Chancery, but since have been altered.

#### Maddy's Case.

Raym. 212.  
2 Keb. 829.

John Maddy was indicted, for that he ex malitia sua præcogitavit felonice murdravit Franc' Mavers, upon which he was arraigned at the Assizes in Southwark, and pleaded Not guilty; and the Jury found a Special Verdict, by the direction of Justice Twisden, then Judge of Assize there, which was to this effect:

That Maddy coming into his House, found Mavers in the act of Adultery with his the said Maddy's Wife, and he immediately took up a Stool and struck Mavers on the head, so that he instantly died.

They found that Maddy had no precedent Malice towards him, and so left it to the Judgment of the Court, whether this were Murder or Manslaughter?

The Record was this Term removed into the King's Bench by Certiorari, and Maddy brought by Habeas Corpus. And the Court were all of Opinion that it was but Manslaughter, the Probocation being exceeding great, and found that there was no precedent

cedent *Malice*; and it was taken to be a much stronger Case than *Royley's Case*, 2 Cro. 296. where the Son of Royley coming home with a bloody Nose, and telling his Father that such an one beat him in such a Field, to which Field (which was a mile off) the Father immediately run, and found him that had beat his Son there, and killed him, all which was found upon a Special Verdict, and resolved to be but Manslaughter.

But Twisden said, There was a Case found before Justice Jones, which was the same with this, only it was found, That the Prisoner, being informed of the Adulterer's Familiarity with his Wife, said, he would be revenged of him, and after finding him in the Act, killed him, which was held by Jones to be Murder. Which the Court said might be so, by reason of the former Declaration of his Intent; but no such thing is found in the present Case.

Barber *versus* Fox.

**T**Rin. 22 Car. 2. Rot. 855. In an Assumpsit the Plaintiff declared, That the Ancestor of the Defendant became bounden to him in a certain Sum, and afterwards died, and that he demanded it of the Defendant being his Heir; and the Defendant, in Consideration that the Plaintiff would forbear to sue him for such a time, promised he would pay him. 2 Saund. 136.  
2 Keb. 811.

To this the Defendant pleaded Non Assumpsit, and a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, for that at the time of the Promise there doth not appear, that there was any cause of Suit against the Heir; for 'tis not set forth, that the Ancestor did bind his Heirs, and the Consideration is not here to forbear to sue generally, but to stay a Suit against the Defendant, whom he could not sue. 1 Sid. 248.  
1 Lev. 165.  
Raym. 125.

To which it was answered, That after a Verdict it shall be intended there was cause of Suit, as *Hob. 216. Bidwell and Catron's Case*, An Attorney brought an Assumpsit upon a Promise made to him, in Consideration that he would stay the Prosecution of an Attachment of Privilege; and there held, That it need not appear that there was cause of Suit, for the Promise argues it, and it will be presumed. And here 'tis a strong Intendment, that the Bond was made in Common Form, which binds the Heirs. Ante 120.  
Raym. 127.  
128.

But Judgment was given against the Plaintiff; for the Court said it might be intended, that there was Cause of Action, if the contrary did not appear, which it doth in this Case, for the Bond cannot be intended otherwise than the Plaintiff himself hath expressed it, which shews only, That the Ancestor was bound. And whereas it was said by the Plaintiff's Counsel, That this would attain the Jury, they finding Assumpsit upon a void Promise;

Hale



Hale said there was no Colour for that Conceit, the Plaintiff having proved his Promise and Consideration as 'twas laid in the Declaration, which is the only thing within their Charge upon non Assumpsit, modo & forma.

Bulmer *versus* Charles Pawlet, Lord Saint John.

2 Keb. 824.

**I**n an Ejectment upon a Trial at Bar this Question arose upon the Evidence.

Tenant for Life, Remainder in Tail to J. S. join in a Fine. J. S. dies without Issue; Whether the Conusee should hold the Land for the Life of the Tenant for Life?

Serjeant Ellis pressed to have it found Specially, tho' it is resolved in Bredon's Case, That the Estate of the Conusee shall have continuance; but he said it was a strange Estate, that should be both a Determinable Fee, and an Estate pur auter vie; and he cited 3 Cro. 285. Major and Talbot's Case, where in Covenant the Plaintiff sets forth, That a Feme Tenant for Life, Remainder in Fee to her Husband, made a Lease to the Defendant for Years, wherein the Defendant covenanted with the Lessors, their Heirs and Assigns, to repair; and they conveyed the Reversion to the Plaintiff, and for default of Reparations, the Plaintiff brought his Action as Assignee to the Husband: And resolved to be well brought, because the Wife's Estate passed as drowned in the Fee.

The Court said, Bredon's Case was full in the Point; but the Reason there given, Hale said, made against the Resolution; for 'tis said, That the Remainder in Tail passes first, which if it does, the Freehold must go by way of Surrender and so drown; but they shall rather be construed to pass insimul & uno statu, Hob. 277. In English's Case it was resolved, If Tenant for Life Remainder in Tail to an Infant join in a Fine, if the Infant after reverse the Fine, yet the Conusee shall hold it for the Life of the Conusor, 1 Co. in Bredon's Case, and he resembled it to the Case in 1 Inst. A Man seized in the Right of his Wife, and entitled to be Tenant by the Courtesie, joins in a Feoffment with his Wife, the Heir of his Wife shall not avoid this during the Husband's Life.

Nevertheless he told Ellis, That he would never deny a Special Verdict at the request of a Learned Man; but it appearing, that the Plaintiff had a good Title after the Life should fall, the Defendant bought it of him, and the Jury were discharged.

Sacheverel *versus* Frogate.

**P**AS, 23 Car. 2. Rot. 590. In Covenant the Plaintiff declared, <sup>Ante 148.</sup>  
 That Jacinth Sacheverel, seised in Fee, demised to the Defen- <sup>2 Saund. 367.</sup>  
 dant certain Lands for Years, reserving 120 l. Rent. And therein <sup>Raym. 213.</sup>  
 was a Covenant, That the Defendant should Yearly, and every <sup>2 Lev. 13.</sup>  
 Year during the said Term, pay unto the Lessor, his Executors, <sup>2 Keb. 798,</sup>  
 Administrators and Assigns the said Rent; and sets forth, how <sup>819, 833,</sup>  
 that the Lessor devised the Reversion to the Plaintiff, and for <sup>839.</sup>  
 120 l. Rent since his Decease he brought the Action. <sup>Dev. 14.</sup>

The Defendant demanded Oyer of the Indenture, wherein the Reservation of the Rent was Yearly during the Term to the Lessor, his Executors, Administrators and Assigns, and after a Covenant prout the Plaintiff declared, and to this the Defendant demurred.

It was twice argued at the Bar, and was now set down for the Resolution of the Court, which Hale delivered with the Reasons.

He said, They were all of Opinion for the Plaintiff. For what <sup>2 Lev. 13.</sup>  
 Interest a Man hath, he hath it in a double Capacity, either as a Chattel, and so transmissible to the Executors and Administrators, or as an Inheritance, and so in Capacity of transmitting it to his Heir.

Then if Tenant in Fee makes a Lease, and reserves the Rent to him and his Executors, the Rent cannot go to them, for there is no Testamentary Estate. On the other side, If Lessee for 100 Years should make a Lease for 40 Years, reserving Rent to him and his Heirs, that would be void to the Heir.

Now a Reservation is but a Return of somewhat back in Retribution of what passes; and therefore must be carried over to the Party which should have succeeded in the Estate if no Lease had been made, and that has been always held, where the Reservation is general.

So, tho' it doth not properly create a Fee, yet 'tis a descendible Estate; because it comes in lieu of what would have descended; therefore Constructions of Reservations have been ever according to the Reason and Equity of the thing.

If two Joint-tenants make a Lease, and reserve the Rent to one of them, this is good to both, unless the Lease be by Indenture, because of the Estoppel; which is not in our Case, for the Executors are Strangers to the Deed.

'Tis true, if A and B join in a Lease of Land, wherein A. hath nothing, reserving the Rent to A. by Indenture, this is good by Estoppel to A. But in the Earl of Clare's Case it was resolved, That where he and his Wife made a Lease reserving a Rent to  
 himself,



himself and his Wife and his Heirs, that he might bring Debt for the Rent; and declare as of a Lease made by himself alone, and the Reservation to himself; for being in the Case of a Feme Covert, there could be no Estoppel, altho' he signed and sealed the Lease.

Ante 136.  
Hardres 89.

There was an Indenture of Demise from two Joint-tenants reserving 20 l. Rent to them both; one only sealed and delivered the Deed, and brought Debt for the Rent, and declared of a Demise of the Moiety, and a Reservation of 10 l. Rent to him. And resolved that he might. Between Bond and Cartwright (which see before) and in the Common Pleas, Pas. 40. Eliz. Tenant in Tail made a Lease reserving a Rent to him and his Heirs. It was resolved a good Lease to bind the Entail, for the Rent shall go to the Heir in Tail along with the Reversion; tho' the Reservation were to the Heirs generally. For the Law uses all Industry imaginable, to conform the Reservation to the Estate. Whitlock's Case, 8 Co. is very full to this, where Tenant for Life, the Remainder over so settled by Limitation of uses, with power to the Tenant for Life to make Leases, who made a Lease reserving Rent to him, his Heirs and Assigns.

Resolved, That he in the Remainder might have the Rent upon this Reservation.

Hard. 92, 23,  
94, 95.

So put the Case, That Lessee for 100 Years should let for 50, reserving a Rent to him and his Heirs during the term; I conceive this would go to the Executor. 'Tis true, if the Lessor reserves the Rent to himself; 'tis held, it will neither go to the Heir or Executor: But in 27 H. 8. 19. where the Reservation is to him and his Assigns, it is said, that it will go to the Heir. And in the Case at Bar the Words, Executors and Administrators, are void; then 'tis as much as if reserved to him and his Assigns during the Term, which are express Words declaring the Intent, and must govern any implied Construction, which is the true and particular Reason in this Case.

6 Co. 62.

The old Books that have been cited have not the Words, during the Term. Vid. Lane 256. Richmond and Butcher's Case indeed is judged contrary in point, 3 Cro. 217. but that went upon a mistaken ground, which was the Manuscript Report, 12 E. 2. Whereas I suppose the Book intended was, 11 E. 3. Fitz. Assize, 86. for I have appointed the Manuscript of E. 2. (which is in Lincoln's-Inn Library) to be searched, and there is no such Case in that Year of E. 2. The Case in the 12 E. 3. is, A Man seised of two Acres, let one, reserving Rent to him, and let the other, reserving Rent to him and his Heirs; and resolved, That the first Reservation should determine with his Life, for the Antithesis in the Reservation makes a strong Implication that he intended so. In Wotton and Edwin's Case, 5 Jac. the Words of Reservation were, Yielding and paying to the

Lessor,

Lessor, and his Assigns. And resolved, That the Rent determined upon his Death. In that case there wanted the effectual and operative Clause, during the Term.

The Case of Sury and Brown is the same with ours in the words of Reservation; and the Assignee of the Reversion brought Debt, and did not averr the Life of the Lessor. And the Opinion of Jones, Croke and Doderidge was for the Plaintiff; Latch's Rep. 99.

The Law will not suffer any Construction to take away the Energy of these words, during the Term.

If a Man reserves a Rent to him or his Heirs, 'tis void to the Heir, 2 Inst. 214. a. But in Mallory's Case, 5 Co, where an Abbot reserved a Rent during the Term to him or his Successors, it was resolved good to the Successor.

It is said in Brudenel's Case, 5 Co. That if a Lease be made for Years, if A. and B. so long live, if one of them dies, the Lease determines, because not said, If either of them so long lives. So it is in point of Grant. But it is not so in point of Reversion, for Pas. 4 Jac. in the Common Pleas between Hill and Hill, the Case was, A Copyholder in Fee, (where the Custom was for a Widow's Estate) made a Lease by Licence, reserving Rent to him and his Wife during their Lives, (and did not say, Or either of them,) and to his Heirs. It was resolved,

First, That the Wife might have this Rent, tho' not Party to the Lease.

Secondly, That tho' the Rent were reserved during their Lives, yet it should continue for the Life of either of them; for the Reversion, if possible, will attract the Rent to it, as it were, by a kind of Magnetism. Ante 148.

Hoskins *versus* Robins.

**A** Replevin for six Sheep. The Defendant makes Conusance, &c. Ante 123. for Damage felant: The Plaintiff replied, That the place 2 Saund. 324. where was a great Waste, parcel of such a Manor, within which 1 Mod. 74. there were time out of mind Copyhold Tenants, and that there 2 Lev. 2. was a Custom in the Manor, that the said Tenants should have the 2 Keb. 557, sole and several Pasture of the Waste, as belonging to their Tenements, and shews that the Tenants licenced him to put in his Beasts. 842. 1 Lev. 253, 268.

The Defendant traverses the Custom, and found for the Plaintiff. The Exceptions, moved in Arrest of Judgment, were now spoken to again.

First, That the Custom to have the sole Pasture, and thereby to exclude the Lord, is not allowable. It hath been ever held, That such a Prescription for Common is not good, and why should the same thing in Effect be gained by the Change of the Name? Postea 384. Vaugh. 251, &c. 1 Saund. 347, &c. 350. 2 Keb. 513, 517.



That Prescription for Pasture, and Prescription for Common is the same thing, Vid. 3 Cro. Daniel v. Count de Hertford 542. And Rolle tit. Prescription, 267, it is held, A Man may claim Common for half a Year, excluding the Lord; and that one cannot prescribe to have it always so, is not because of the Contradiction of the Term; for if the sole Feeding be but for half a Year, 'tis as improper to call it Common: but the true Reason seems to be, because it should in a manner take away the whole Profit of the Soil from the Lord, and he should by such Usage lose his greatest Evidence to prove his Title; for it would appear that the Land was always fed by the Beasts of others; it would be very mischievous to Lords, who live remote from their Manors, or that seldom put their Beasts there (as many times they do not) so that by the Tenants solely using to feed it, they should lose their Improvements provided for the Lords by the Statute; and so come at last for want of Evidence to lose the Soil it self.

Secondly, This Custom is laid, To have the sole Feeding belonging to their Tenements, and 'tis not said for Beasts levant and couchant, or averred that the Beasts taken were so. 15 E. 4. 32. and Roll. tit. Common 398. Fitz. tit. Prescription 51. A Man cannot prescribe to take Estovers as belonging to his House, unless he avers them to be spent in his House, Noy 145. So 2 Cro. 256. tho' the Prescription was there to take omnes Spinas, for it is necessary to apply it to something which agrees in nature to the thing. Brownlow 35.

Thirdly, Here the Plaintiff justifies the putting in his Beasts by a Licence, and doth not say it was by Deed, whereas it could not be without Deed; and so is the 2 Cro. 575.

Fourthly, Those defects are not aided by the Verdict, for they are in the Right and of Substance. But the Court were all of Opinion for the Plaintiff.

2 Saund. 326.

First, They held the Prescription to be good, and being laid as a Custom in the Manor, it was not needful to express the Copyhold Estates: It doth not take away all the Profit of the Land from the Lord; for his Interest in the Trees, Mines, Bushes, &c. continues. Co. Inst. 122. a. is express, That a Prescription may be for sola & separalis pastura; and if it may be for half a Year, upon the same reason it may be for ever. An Interest of this nature might have commenced by Grant. 18 E. 3. The Lord granted to the Tenant that he would not improve; tho' it may be such a Grant were not good at this Day.

Postea 390.

The Court were agreed in this Point, in the Case between Potter and North brought here about three Years since; the principal Doubt in that Case was, Whether the Freeholders and Copyholders could in pleading alledge a joint Prescription for the sole Pasture? And for the mischief alledged, that this might be obtained from every Lord, that had not of a great many Years used his Common;

Hale said, It would not be sufficient to prove an Usage for the sole Pasture, to shew that the Tenants had only fed it; unless it were proved also, that the Lord had been opposed in putting in of his Cattle, and the Cattle impounded from time to time.

To the second Objection: They held that Levancy was not material in this Case, because the sole Feeding is claimed. So where Common for a certain number of Beasts is claimed, 'tis possible between the Tenants there may be some proportioning of it, that one may not eat up all from the rest; but 'tis not material to the Owner of the Soil. And Twisden said, It was resolved in this Court, between Stonell and Masselden, That the want of Averment of Levancy and Couchancy was aided by a Verdict.

Thirdly, Tho' the Licence is not shewn to be by Deed, they resolved it was well enough. 'Tis true, if the Licence were to make Title against the Party which gave it, there would be greater question: For 'tis nothing to the Plaintiff, who it appears had no Damage; at the most, it is but a Mispleading aided by 32 H. 8. And the Plaintiff waved this matter, and took Issue upon the Custom, which is the material Point, and it is found against him. There might have been more colour upon a Demurrer. Ante 123.

Anonymus.

A Prohibition was granted to a Suit for Fees in the Ecclesiastical Court by an Apparitor, upon a Suggestion, That there were no such Fees due by Custom.

For that is triable by Law, and not by a decimaria or vicenaria Præscriptio, which is allowed in their Courts: But they may sue there for their due and customary Fees.

Brell *versus* Richards.

Error upon a Judgment in the Common Pleas, in an Ejectment against eight Defendants, and the Writ was, Ad grave dampnum ipsorum; the Judgment was only against three, and the other five were acquitted. The Error was assigned in the Nonage of the three.

It was moved, Whether the Writ of Error was well brought; or whether the Judgment should be reversed in toto?

The Court resolved, That the Writ was good, tho' it might be also ad damnum only of those convicted: But being only in the nature of a Commission, whereby the King commands the Errors to be examined, this matter is not material.

And



And Twisden said, That the constant Practice is for all to join :  
And they all held, That the Judgment ought to be reversed against  
all.

Sir Anthony Bateman's Case.

Ante 5, 19  
1 Mod. 76.

**U**Pon a Trial at Bar, the Question was, Whether he were  
a Bankrupt or no ?

It was proved that he was a Turkey Merchant, and traded in  
the Year 1656, but it was not proved, That he had afterwards  
imported or exported any thing, but having the Effects of his former  
Trade by him to a great Value, he shewed them to several, and ob-  
tained the Loan of divers Sums of Money upon the Credit of  
them.

Ante 29.  
1 Sid. 411.

The Court held, That this brought him within the Statute, for  
such Debts as he contracted after 1656, otherwise the Mischief would  
be great ; for Men cannot take notice when another withdraws his  
Trade, or when he commands his Factors beyond Sea to deal no  
further for him ; but they seeing great quantities of Goods and  
Merchandise in his Hands, are apt to trust him : Wherefore 'tis  
fit that they should be relieved by the Statute.

Legg and Richards.

1 Mod. 77.

**A**N Administrator brought a Writ of Error upon a Judgment  
given in an Ejectment against the Intestate.

It was held, That he should pay no Costs, tho' the Judgment  
were affirmed, and the Writ brought in dilacione Executionis.

The Bishop of Exeter *versus* Starr.

Raym. 225.  
2 Keb. 814,  
&c.  
1 Lev. 36.  
3 Keb. 219,  
286.

**I**N Debt upon a Bond, the Condition recited, That whereas  
the Obligor was excommunicated for not coming to Church,  
and that the now Plaintiff at his Instance and Request had absol-  
ved him : That if he should obey all the lawful Commands of the  
Church, that then, &c.

The Defendant demurred, supposing the Condition to be against  
Law, and so the Bond void.

Hale said, If a Man were excommunicated, there was a Writ  
De cautione admittenda ; and sometimes they took an Oath of the  
Party, ad parendum omnibus Ecclesiæ mandatis licitis & honestis ;  
and that was called Cautio juratoris ; and sometimes Cautio pigno-  
raticia was given.

1 Bullstr. 422.

He said also, It was held 8 Car. in Com' Banco, that where the  
Ecclesiastical Court took a Bond of an Administrator, to make  
Distribution of what remained of the Intestate's Estate after Debts  
and Legacies satisfied, or to dispose so much to pious Uses, that  
the

the Bond was void; for they presumed the Party in such Cases to be under a kind of Coercion. Et adjournatur.

*Isaac versus Ledgingham.*

**I**N a Replevin, the Defendant avowed for a Suit of Court.

The Plaintiff replies, and confesseth himself Tenant of the Manor; and saith, That there are very many Tenants of the Manor, and that there is a Custom, That if those Copyholders which live remote from the Manor, pay Eight pence to the Steward of the Court for the Lord, and 1 d. to himself for the entering of it, that they should be excused of doing their Suit for one Year after the said Payment; and alledgeth, That he lives 10 Miles from the Manor, and that he tendered the 8 d. and 1 d. and both were refused.

1 Mod. 77.  
1 Sid. 361.  
2 Keb. 847.

To this the Abowant demurred:

First, The Custom is unreasonable; for by means of it no Court can be kept, if so be all the Tenants live remote.

Secondly, The Plaintiff hath not brought himself within the Custom; for that is to be discharged upon Payment, and not upon Tender and Refusal: And the Construction of Customs is always strict to the Words, and not with that Latitude as is used in Contracts.

Hale. 'Tis Custom gives the Suit, and consequently may qualify it: The Doubt arises, because the Plaintiff hath not alledged, that there any Tenants live near or within the Manor; or whether that ought to be shewn on the other side, if it be not so; because the Intendment is strong, that there are. Therefore a By-Law in a Manor binds the Tenants without Notice; because they are supposed to be within the Manor.

For the other matter they all held, That Tender and Refusal was as much as Payment.

And Twisden said, It was resolved, where an Award was made that A. should pay B. 10 l. and that B. super receptionem decem librarum should release, that he was bound to release it, if the Money were offered, tho' he should refuse it. Wherefore they gave Judgment for the Plaintiff.

8 Co. 76.  
1 Inst. 203.  
1 Roll. 129.  
9 Co. 79.

*Sir John Coriton and Harvey versus Lithby.*

**P**Asch. 22 Car. 2. Rot. 331. In an Action upon the Case the Plaintiffs declared, That there were four ancient Mills within a Manor,

2 Saund. 115.  
2 Vent. 288,  
291.  
2 Keb. 803,  
&c.

And that J. C. was seised in fee of two of the Mills, and J. H. of the other two; and laid a Prescription in each, That they had kept the Mills in Repair, and found Grinders, to the intent that

1 Lev. 27.



that the Tenants of the Manor might grind at them; and that time out of mind the Tenants had ground omne frumentum, to be spent in their Houses, at the Mills of J. C. or at the Mills of J. H. And for that the Defendant spent Corn which was ground at neither of the Mills, they brought this Action.

To this Declaration the Defendant demurred:

First, For that they join in the Action, and so the one shall recover Damages for not Grinding at the other's Mill, which is no Loss to him.

Hob. 189.

Secondly, The Prescription is for Grinding all the Corn to be spent in the Houses of the Tenants, which is unreasonable; for a great deal of Corn is used which is not proper to grind. So it was said to be adjudged between Aylett and Charlesworth 1654. in B. R. that the Prescription ought to be laid for all Corn, tritandum & consumendum in their Houses. And this last Exception was held to be material by all the Court.

But they conceived the Action might be brought by both; for otherwise there could be no Remedy upon the Prescription. For singly they could not bring it, because Grinding at any of the Mills would excuse the Defendant.

But Hale said, The Declaration was naught; because it is, That the Defendant ought to grind at the Mills of J. C. or J. H. which is true, if either of them hath an ancient Mill, altho' the other hath no Pretence or Right upon the Prescription: And therefore it ought to have been laid thus; That such Corn, &c. as was not ground at the Mills of J. C. ought to be ground at the Mills of J. H. and then have averred, That the Defendant's Corn was ground at neither of them. It was adjudged for the Defendant.

Skinner *versus* Webb.

2 Keb. 849.  
Scire facias.  
1 Mod. 79.

**T**HE Case was this: A Judgment was recovered in this Court in an Action upon the Case upon a Bill of Exchange, and a Scire facias was brought Quare execution, &c. and a Judgment upon that; upon which a Writ of Error was brought in the Exchequer-Chamber, and the Judgment was affirmed; after which the Defendant died, and a Scire facias (reciting the Judgment, and Affirmance of it in the Exchequer-Chamber) was brought against the Administrator, and Judgment had upon that; and the Administrator brought Error upon the Judgment in the last Scire facias.

The Court were moved, not to allow this Writ of Error, or at least not to supersede Execution, by reason of its being a second Writ of Error.

And the Court held, That this Writ of Error did not lie into the Exchequer-Chamber; tho' it hath been resolved, that such Writ of

of Error lies in the Exchequer-Chamber, (by the Statute of the 27th of Eliz.) upon a Judgment in a Scire facias, recover'd upon a Judgment in an Action brought by Bill in this Court; because 'tis in Execution of the Judgment, and is (as it were) a piece of the first Action. Otherwise of a Judgment in a Scire facias upon a Recognizance, or the like.

1 Mod. 79.  
Ante 38.  
Hob. 72.  
2 Cro. 171.

Now this Scire facias is brought upon a Judgment affirmed in the Exchequer-Chamber, which therefore is privileged from any other Writ of Error to be brought upon it there: So that this Writ of Error can be brought only upon the Judgment given in the Scire facias; and therefore it doth not lie into the Exchequer-Chamber.

*Scifa*

#### Jacob Hall's Case.

Complaint was made to the Lord Chief Justice by divers of the Inhabitants about Charing-Cross, That Jacob Hall was erecting of a great Booth in the Street there, intending to shew his Feats of Activity, and Dancing upon the Ropes there, to their great Annoyance, by reason of the Crowd of idle and naughty People that would be drawn thither, and their Apprentices inveigled from their Shops.

1 Mod. 76.  
2 Keb. 846.

Upon this the Chief Justice appointed him to be sent for into the Court, and that an Indictment should be presented to the Grand Jury of this matter; and withal the Court warned him, that he should proceed no further.

But he being dismissed, they were presently after informed, That he caused his Workmen to go on. Whereupon they commanded the Marshal to fetch him into Court: And being brought in and demanded, How he durst go on in contempt of the Court? He with great Impudence affirmed, That he had the King's Warrant for it, and Promise to bear him harmless.

Then they required of him a Recognizance of 300 l. that he should cease further Building; which he obstinately refused, and was committed: And the Court caused a Record to be made of this Nuisance, as upon their own View (it being in their Way to Westminster,) and awarded a Writ thereupon to the Sheriff of Middlesex, commanding him to prostrate the Building.

And the Court said, Things of this nature ought not to be placed amongst Peoples Habitations, and that it was a Nuisance to the King's Royal Palace; besides, that it straitned the Way, and was insufferable in that respect.

#### The King *versus* Wright.

An Indictment was against him for suffering of two Persons to escape, qui commissi fuerunt by the Justices of the Peace, for an Offence against the Statute of 8 H. 6. of Forceable Entry.

3

After



After a Verdict for the Plaintiff, and Judgment, a Writ of Error was brought, and assigned for Error, That it was not expressed how the Commitment was, whether upon View of the Justices, or Verdict upon an Indictment; so that it doth not appear that they were legally committed, nothing of the Proceedings being set forth, and 'tis not so much as said, debito aut legitimo modo commissi fuerunt. If a Man be indicted of Perjury in his Oath sworn before a Master of Chancery; it must be shewn, that the Master had an Authority to take an Oath.

And the Court doubted at first, and commanded the Clerk of the Crown to search Precedents, and he found that they were most, debito modo commissi; but some without that Clause: And the Court held, it being but Inducement to the Offence whereupon this Indictment is, that it was well enough alledged, and after the Verdict they must intend the Commitment was legal. Vide Crompton's Justice of Peace, 252. a. 255. There are two Precedents like this.

Note, It was said by Hale, That upon non Assumpsit Infancy might be given in Evidence, tho' upon non est factum it could not.

The King *versus* Alway and Dixon.

2 Saund. 393.  
1 Mod. 81.

**E**rror to reverse a Judgment upon an Indictment, because the Award of the Venire was entred, *Præceptum fuit Vicecomiti, &c.* which is more like an History of the Record, than the Record it self; for it ought to be *Præceptum est*, and so are the Precedents: And for this Cause it was reversed.

Waldron *versus* Ruscarit.

**H**ILL. ult. Rot. 225. In an Ejectment a Special Verdict was found, That one levied a Fine of all his Lands in Saint Inderion in Cornwall, and that he had Lands in Portgwyn, and that the Constables of Saint Inderion exercised their Authority in Portgwyn; and that Portgwyn had a Tithing-man.

And whether this Fine conveyed the Lands in Portgwyn was left to the Judgment of the Court; and resolved that it did.

A Parish may contain ten Tiths; and if a Fine be levied of the Lands in the Parish, this carries whatsoever is in any of those Tiths. So where there are divers Tiths, if the Constablewick of the one goes over all the rest, that is the Superiour or Mother-Tith, and the Land which is in the other shall pass per nomen of all the Lands in that: And tho' it be found that Portgwyn had a Tithing-man, Decenarius, which *prima facie* is the same with a Constable, and differed little in the Execution of that Office concerning

2 Keb. 802,  
821, 848.  
Ante 143.  
2 Mod. Rep.  
from 234, to  
239, 47, 49.  
2 Vent. 31.  
2 Cro. 120.  
1 Mod. 78,  
117, 206,  
250.  
Owen. 60.  
Hutton 93.  
11. R. 73.

cerning Keeping the Peace; Yet Hale said, He was not the same Officer; and 'tis found that the Constables of St. Inderion have a Superintendency over Portgwyn, and therefore 'tis but as an Hamlet of St. Inderion. But if found that they had distinct Constables, and could not interfere in their Authority, it would be otherwise. Owen 60.

Note, It was said by the Court, That if there be a Conviction of a Forceful Entry upon the View of the Justices of the Peace, no Writ of Error lies upon it; but it may be examined upon a Certiorari. Antea 30.

The King *versus* Green & al'.

They were indicted for refusing to take the Oath of Allegiance contained in the Statute of 3 Jac. tendered to them at the Sessions of the Peace. Raym. 212. 2 Saund. 389. 2 Keb. 825, 830.

One appeared, and the Entry was Nihil dicit, &c. ideo remansit Dom' Rex *versus* eundem indefensus.

And the others were convicted, and Judgment given quod forisfaciant omnia bona & catalla, terr' & tenementa Domino Regi & extra protectionem Dom' Regis ponantur & committuntur, & quilibet eorum committitur Gaolæ. They brought Error. And

First, It was moved, That the Indictment was for refusing the Oath contained in the Statute of 3 Jac. in his Anglicanis Verbis (viz.) I do truly and sincerely acknowledge, &c. that our Sovereign Lord King Charles the Second is rightful King of this Realm, &c. Whereas the Statute is King James; and the Words of the Statute are, That the Justices of the Peace shall demand of such Persons there mentioned, to take the Oath hereafter following. So that 'tis tied up to that Oath in terminis, and then it cannot be administered after the Death of King James. And the diversity of the Penning of this Act of 3 Jac. and the Act of 7 Jac. was observed in the last; the Words are, Shall take and receive an Oath according to the Tenor and Effect of the Oath contained in 3 Jac. which is as much as to say, the same Oath in Substance. So the Act of 1 Eliz. cap. 1. is, That the Oath shall be taken according to the Tenor and Effect hereafter following. Therefore it was objected, That the Indictment might have been upon the Act of 7 Jac. but not upon 3 Jac. which, it was conceived, was tied up to the Person of King James, and therefore determined by his Death. As if a Lease be made durante beneplacito Regis nunc, it doth end by the Demise of that King that made it; Otherwise, if it be durante beneplacito Regis. Moor pl. 311. And tho' these Statutes for the Oath of Allegiance be general Laws, and need not have been recited; yet when an Indictment is grounded upon an Act therein mentioned, which will not maintain it, it shall not be made good upon any other general Act.

3 2

Secondly,



Secondly, Another Matter insisted upon for Error, was in the Entry of the *Nihil dicit*, which was *ideo remansit Dom' Rex versus eundem indefensus*, whereas it ought to have been remanet, and so the Record it self must express: But as it is, 'tis but an history of the Return, and therefore upon Indiaments where the Award of the Venire is *Præceptum fuit*, 'tis not good, but should be *Præceptum est*.

Thirdly, An Exception was taken to the Venire, which commands the Sheriff to return 12 probos & legales homines, qui nec Dom' Regem nec aliquam partem aliqua affinitate attingunt; whereas in the King's Cases his Kindred may be returned, and therein no Challenge to the Favour, neither ought the Sheriff to be restrained from returning them.

Fourthly, The Judgment is *Committantur*, & quilibet eorum committitur, which is an Execution of the Judgment that should have been given, and not the Judgment it self, which ought to have been *Committantur*, &c. as 'tis extra protectionem Domini Regis ponantur, and not ponuntur.

Fifthly, It was alledged, That the Statute was misrecited in two places.

1. For See of Rome, it is written Sea of Rome; so instead of *sedes Romana*, it is *mare Romanum*, which makes it to be no Sense.

2. The Words of the Statute are, I do declare in my Conscience before God, whereas the Indiament is, I do declare, &c. in Conscience, and leaves out my.

It was also objected, That the words of the Act being, That such as refuse the Oath shall incur the danger and penalty of *Præmunire* mentioned in the Statute of 16 R. 2. which enacts, That Process shall be made against the Offenders therein mentioned by *Præmunire facias*, in manner as 'tis ordained in other Statutes. And it appears that no such Process was made upon this Indiament; wherefore the Statute is not observed.

Curia. The first Error was disallowed by all the Court, and held clearly, that the Judgment was well grounded upon the Statute of 3 Jac. For the naming of the King is but an instance of the thing as it stands at present; and it might as well be objected, That the Oath in the Statute is, I A, B. do swear, &c. And tho' some Statutes say according to the Tenor and Effect, and this is the Oath hereafter following, it was held to be all one; for according to the Tenor and Effect, and according to the words are all one, as where a *Certiorari* is to certify Tenorem Recordi.

The second was held to be Error, and that the Judgment given upon the *nihil dicit* must be reversed; for there were several Judgments given, viz. One upon that, and another given against the rest, which therefore was not affected by that Error.

The

The fourth was over-ruled; for where the Party is present, the Judgment is always quod committitur, as appeared by the Precedents.

Fifthly, The Variances from the Statute were not held to be material; for in old Writings, 'tis written Sea of Rome; and declaring in Conscience, and in my Conscience, are the same.

The sixth Error was also disallowed, for the Words of the Statute are, Shall incur the danger and penalty of Præmunire mention'd in 16 R. 2. which doth not necessarily bind up to the Process; but means that such Judgment and Forfeiture shall be, and it appearing that the Parties were present, there was no need of any Process.

But as to the third Exception which was taken to the Venire, they said they would be advised until the next Term; and they told the Prisoners, (who were Quakers, and had brought a Paper which they said contained their Acknowledgment of the King's Authority, and Profession to submit to his Government; and that they had no Exception to the matter contained in the Oath, but to the Circumstance only, and that they durst not take an Oath in any Cause, which they prayed might be read, but could not be permitted) that their best course was to supplicate his Majesty in the mean time for his Gracious Pardon.

Vid. 16 R. 2.  
5. which  
make this  
very clear.

Radly and Delbow *versus* Eglesfield and Whital.

**I**n an Action sur 13 R. 2. cap. 5. & 2 H. 4. cap. 11. for suing the Plaintiff in the Admiralty, for a Ship called the Malmoise, pretending she was taken piratice; whereas the Plaintiff bought her infra corpus Com. It seems there was a Sentence of Adjudication of her, to be lawful Prize in Scotland in April 1667, as having carried bellicos apparatus (i. e. Contraband Goods in the late Dutch War) and the Plaintiff bought her here under that Title.

2 Saund. 259.  
2 Lev. 25.  
2 Keb. 828.

The Libel was, That the Ship belonged to the Defendants, and about January 1665, was laden with Halls, and had Letters of Safe Conduct from the Duke of York to protect her from Concussion, &c. and that certain Scottish Privateers did practise to take the said Ship; and after the Defendants took her, and being requested, refused to deliver her, and that ratione lucri cessantis & damni emergentis, they suffered so much loss, &c.

The Defendants pleaded Not guilty to this Action, and upon the Trial would not examine any Witnesses, but prayed the Opinion of the Court; who said there was good Cause upon the Libel, (which now they must take to be true) in the first Instance for the Admiralty to proceed. In 43 Eliz. it was resolved, If Goods are taken by Pirates on the Sea, tho' they are sold afterwards at Land,

Raym. 473.  
1 Sid. 320.  
1 Cro. 685.  
Yelv. 125.  
Sty. 418.

pet



1 Sid. 320. yet the Admiralty had Consuance thereof; for that which is inci-  
 1 Roll. 531. dent to the original matter, shall not take away the Jurisdiction;  
 Hob. 78. and that is Law, tho' there were another Resolution in Bingley's  
 Molloy 9, Case. 3 Jac 7 Ed. 4. 14. and 22 Ed. 4. If Goods are taken by an  
 10, 11. Enemy, and retaken by an Englishman, the Property is changed:  
 Yelv. 92. Otherwise, if by Pirates. And if in this Case the taking were not  
 Cro. El. 92. piratice, it ought to have been alledged on the other side. Had the  
 Sentence in Scotland been pleaded in the Admiralty, the Court would  
 have given Deference to it; as if a Man had a Judgment in Com-  
 muni Banco, and should begin a Suit for the same in Banco Re-  
 gis; This might be made a good Plea to the Suit, but not to  
 the Jurisdiction; for, for ought appeared, this might have been the  
 first Prosecution, and no Proceedings might have been in Scot-  
 land.

Foster 308. This came to be tried at the Nisi prius before Hale, who was  
 of the Opinion, ut supra, then. But because it was a Cause of  
 Weight, he ordered it to be tried at the Bar. And because 'twas  
 for his Satisfaction, and for a full Resolution, the Jury was paid  
 between the Parties. Note, A Proctor, sworn a Witness, said, When  
 this Cause was in the Admiralty, there was a provisionate De-  
 cree, as they call it, or primum Decretum, which is a Decree of  
 the Possession of the Ship, and upon that an Appeal to the Dele-  
 gates; but my Lord Keeper being informed, That no Appeal to  
 them lay upon it, because it was but an interlocutory Decree, upon  
 hearing of Counsel he superseced the Commission.

When a Ship is so seized, upon Security given, 'tis the Course  
 of the Admiralty to suffer her to be hired out.

Watkins *versus* Edwards.

1 Mod. 286. P Asch. 22 Car. 2. Rot. 408. An Action of Covenant was brought  
 2 Keb. 696, by an Infant per Guardianum suum, for that he being bound  
 745, &c. j Apprentice to the Defendant by Indenture, &c. the Defendant did  
 5 Eliz. c. 4. not keep, maintain, educate and teach him in his Trade of a  
 Draper as he ought, but turned him away.

The Defendant pleads, That he was a Citizen and Freeman  
 of Bristol; and that at the General Sessions of the Peace there,  
 there was an Order made, That he should be discharged of the  
 Plaintiff for his disorderly Living, and beating of his Master and  
 Mistress; and that this Order was enrolled by the Clerk of the  
 Peace, as it ought to be, &c. To this the Plaintiff demurs.

The first question was, Whether the Statute extends to all Ap-  
 prentices, or only such as are imposed upon their Master by the Ju-  
 stices, and compellable to serve. And Hale and Moreton inclined,  
 That it did not extend to all Apprentices. Twifden and Rainsford  
 contrary.

Secondly, Whether they had Power to discharge the Master of his Apprentice, as they might, & e converso.

Hale conceived they could not; but cause the Servant to have due Correction, in case the Master complained of him.

Twisden, Rainsford and Moreton, contra. For he may be so incorrigible, that the Master cannot keep him without standing in continual fear; and in Mich. 21, and Hill. 21. & 22 Regis nunc, upon the removal of an Order of Sessions from York, it was resolved, That the Master might be eased of his Apprentice by the Sessions upon just Cause. And Twisden said, Shelton, Clerk of the Peace for Middlesex, informed him, that such Orders are frequently made.

Hankworth's Case.  
1 Saund. 313.  
314, 315.

Thirdly, The great question was, Whether the Defendant ought not to have applied himself to one Justice first, as the Statute directs; that he might (if he could) have settled the Business, and if not, then to go to the Sessions, and not to go thither per saltum, as upon the Statute of the 18 Eliz. cap. 3? The Sessions cannot make an Order for keeping of a Bastard, but upon an Appeal from the two Justices, who are first to make an Order.

1 Saund. 316.  
1 Mod. 287.

Hale. This Case differs, for the 18 Eliz. gives the first Man Power to make an Order, which shall bind the Parties until it is avoided by Appeal; but this Statute of 5 Eliz. gives no Jurisdiction to the first Man, for he is only to compound the business if he can.

Twisden. The discharge being set forth in an Order, we must intend it duly made; 'tis the common Practice to go to the Sessions first. It was moved at first, that it did not appear that the Plaintiff had Notice; but that Point was waved, for being in a judicial Proceeding, it shall be intended. Et adjournatur.

*Lucy versus Levington.*

**P**Asc. ult. Rot. 96. Covenant by the Plaintiff as Executor of J. S. for that the Defendant covenanted with J. S. his Heirs and Assigns, to levy a Fine, &c. and that they should enjoy the Lands against all other Persons claiming under Sir Peter Vanlore; and then he says, That Sir Robert Crooke and Abraham Vandebendy in the Testator's Life-time, did enter claiming under Sir P. Vanlore, &c.

2 Keb. 831.  
2 Lev. 26.

The Defendant pleads, That he had a good and indefeasible Title in the Lands at the time of the Covenant, by virtue of certain Fines from Sir Ed. Powel and his Wife; but that in 13 Regis nunc, there was an Act of Parliament, by which these Fines were made, and declared to be, void, and that Sir R. C. and A. Vandebendy had Title, and entered by reason of the Act, and not otherwise. (The Act which was pleaded in hæc verba recites, That certain Men came with armed Force, and thereby extorted, and took the Fines, &c.) And to this the Plaintiff demurred.

*It*



It was urged for the Defendant, That this Title was by matter subsequent to the Covenant, and not any thing which was in being then; as 9 Co. 106. Sir T. Gresham conveys Land to certain Uses, with power of Revocation, and then does revoke, and aliens and dies; the Revocation was not warranted by his Power, but was after made good by Act of Parliament, and then Process went out against his Widow for a Fine, for the Alienation of Sir T. G. the Lands being of capite Tenure; but she was discharged, because the Alienation had its effect by an Act of Parliament, which can do no wrong.

Twilden. 'Tis hard this should be a Breach; for the Defendant cannot be intended to covenant against an Act of Parliament, a thing out of his Power. Baron and Feme levied a Fine, J. S. covenants, That the Conusee shall enjoy it, against all lawfully claiming from B. and F. brings Dower after the Death of B. the Conusee does not plead the Fine, but suffers Judgment and brings Covenant against J. S. and adjudged against him; for the Covenant shall not extend to a Right which is barred, and besides she did not claim lawfully. There is an Old Book which says, That if an Attainder be reversed by Parliament, the Person shall have Trepleas against him, which took the Profits of his Land in the interim.

Hale, My Lady Gresham's Case is not like this; for there the Party was in by the Queen's Consent to the Alienation by the Act she passed; but here the Covenant is broken, as much as if a Man recover Land, and then sell and covenant thus, and then it be evicted in a Writ of Right; for this is in the nature of a Judgment. Tho' it be by the Legislative Power, it may be the prospect of this Act was the Reason of the Covenant; nor has the Defendant reason to complain, for the Act was made because of his own Fraud and Force. Every Man is so far Party to a private Act of Parliament, as not to gainsay it, but not so as to give up his Interest; 'tis the great question in Barrington's Case, 8 Co. the matter of the Act there directs it to be between the Foresters and the Proprietors of the Soil; and therefore it shall not extend to the Commoners, to take away their Common. Suppose an Act says, Whereas there is a Controversy concerning Land between A. and B. 'tis enacted, That A. shall enjoy it. This does not bind others, tho' there be no saving, because it was only intended to end the difference between them two. Whereupon Judgment was given for the Plaintiff.

It was agreed by all the Justices, That tho' the Covenant were made only to J. S. his Heirs and Assigns, and it were an Estate of Inheritance; yet the Breach being in the Testator's Life-time, the Executor had well brought the Action for the Damages.

Peters *versus* Opie.

**I**N an Assumpsit the Plaintiff declares, That there was an Agreement between him and the Defendant, that he (the Plaintiff) should pull down two Walls and build an House, &c. for the Defendant, and that the Defendant should pay him pro labore suo in & circa divulsionem, &c. 8 l. and that in Consideration that the Plaintiff assumed to perform his part, the Defendant assumed to perform his: And the Plaintiff avers, that he was paratus to perform all on his part, but that the Defendant had not paid him the Money: And after a Verdict for the Plaintiff it was moved in Arrest of Judgment, That he did not aver that he had done the work.

Hale. Pro labore here makes a Condition precedent, and therefore the Performance of the work ought to have been averred; for though in case of a Reciprocal Promise, Performance need not be averred, yet if the Promise refers to an Agreement, which contains a Condition precedent, the Performance of that must be averred; as if I should promise one to go to York, and in consideration of that he promise to pay me 10 l. there needs no Averment of my going to York; otherwise, if the Counter-promise were to pay 10 l. for my going to York. So if the Counter-promise were to do a thing after a time (ascertained or to be ascertained,) it must be averred that the time is past. Therefore, that it is laid by way of Reciprocal Promise will not concern much, for every Agreement is a Reciprocal Promise; but the matter is, what the Agreement is. Here though the Reciprocal Promise be the Foundation of the Consideration, yet 'tis to be considered, that it refers to a Conditional Promise or an Agreement, and the Promise obliges not the Defendant to do it otherwise than according to the Agreement. Now to shew this pro labore makes a Condition precedent, suppose the Agreement to be in writing thus, Memorandum that J. S. agrees and promises to build, and J. N. promises to pay him so much for his pains, it cannot be taken but that the building must be precedent to the Payment. 'Tis the common way of Bargaining, and in common dealing men do not use to pay before the work be done; it would be inconvenient to give cross Actions in such cases especially, since 'tis likely that the Workman is a poor Man. 'Tis true, if there be a time limited for the Payment, which time may fall out before the Work or thing be done, there the doing it is not a precedent Condition. Vivian and Shipping, 3 Cro. An Award that one should pay 10 l. and in Consideration thereof, the other should become bound, &c. adjudged the paying the 10 l. was a Condition precedent (5 or 15 H. 7. 10.) is our Case in Point: If the Plaintiff had alledged that he had offered to work, and the

Postea 214.  
2 Saun. 350.  
2 Keb. 811,  
836.  
2 Lev. 23.

Hob. 41, 42.

Hob. 41, 42.

Cr. Car. 385.



Defendant had hindered him, it had been good. The want of the Aberment is not helped by the Verdict, for 32 H. 8. extends not to Declarations or Abowries, but only to Pleading; if otherwise, there had been no need of 21 Jac. c. 13. to cure the want of averring the Party's Life.

Twisden contra. There is no need of the Aberment, there being Reciprocal Promises, upon which the Parties have mutual Remedies, and relied upon the case, 1 Roll. 46.

Rainsford agreed with Hale. Et adjournatur. Postea 214.

## Termino S. Hillarii Anno 23 & 24 Car. II.

### In Banco Regis.

#### Harwood's Case.

1 Mod. 77,  
79.  
Raym. 116.  
1 Sid. 250.  
2 Lev. 32.  
2 Keb. 847,  
855.

**H**E was committed to Newgate by the Court of Orphans; and upon a Habeas Corpus it was returned, That the City of London is an ancient City, and that time out of mind the Mayor and Aldermen have had the Custody of Orphans within the City, until the Age of 21 or Marriage, and that there hath been time out of mind a Court of Record, (called the Court of Orphans) holden before them, having Consulate of all matters concerning Orphans, and that they had power to give Licence to marry a Woman which was their Orphan, or to deny it upon reasonable Cause; and if any one did marry such Orphan without Licence first had from the said Court, that they might impose a reasonable Fine upon him, and if he should refuse to pay it, or to give Security, to commit him to Prison. It was also returned, That Harwood did marry such an Orphan without Licence first obtained, whereupon he being present in Court, they fined him 40 l. and he refusing to pay it, or give Security, was committed.

To this Return, First, it was objected, That this Custom shall not bind Strangers. In 1 Cro. 619. Dean's Case, who was imprisoned for refusing to find Sureties for the Good Behaviour, which was demanded of him, because he called an Alderman Fool, it was returned, That if a Freeman commit such an Offence, &c. So in Andrew's Case, in Hutton 30. one was imprisoned for not giving Security for the Payment of a Legacy, devised by his Testator to an Orphan, he is returned to be a Freeman.

Secondly, This Custom as returned is unreasonable, for it would oblige Strangers at what distance soever from London, who cannot

cannot take notice who are Orphans of the City; yet they should incur a Penalty by marrying them without leave from the City, and they have not returned, that Harwood married the Orphan within the City; and therefore it must be intended that he did not, and in all other Points most advantageously for him, in regard he cannot shew the truth of his Case by pleading to the Return. In an Action upon the Statute of Labourers, the Plaintiff declared, That he retained a Servant at London, and that the Defendant retained him within the Term he had contracted with him for. The Defendant pleaded, that he found him vagrant in another County, and there retained him; and held that it was a good plea, for he was not bound to take notice of a Retainer by the Plaintiff, when it was in another County. 17 E. 4. 7. b. The difference is taken between Customs general, such as Gavelkind, and private particular Customs, the one every one shall take notice of, but not the other, 1 Cro. 561. 3 Cro. Launder and Brook's Case. The Court of Orphans is a particular Jurisdiction, and not to be extended all over England; and it appears by the Books, that they may have a Raviſhment of Ward, F. N. B. 142. B. Hob. 95. which therefore seems to be their proper Remedy, rather than the Course they have now taken.

Thirdly, The Custom is unreasonable, that they should impose the Fine who are to have it, and so to be Judges and Parties.

Fourthly, It was alledged, That the Fine was unreasonable, which is not to be proportioned to the Portion the Orphan is to have, (which was shewn in the Return to be 800 l.) but to the Crime, for it doth not appear, that the City is to have the Value of the Marriage, or any Benefit by it; and in this Case there was no Disparagement, for his Quality deserved such a Portion, and he had the Consent of her Friends.

But notwithstanding these Exceptions to the Return, it was resolved by all the Court, that he should be remanded.

As to the 1st, That it is not returned that Harwood is a Freeman, the Court resolved, That it was not material, for in many Cases Strangers are bound by the Customs of London; as that of Foreign bought and Foreign sold was resolved to be a good Custom, 15 Car. 2. between Hutchins and Players, in Communi Banco.

2. Tho' it appears the Marriage was in a Foreign County, and not shewn that he had Notice, it is all one; for if that might be an excuse, the Government of Orphans by the City of London would be utterly insignificant, for it would be only to seduce the Orphan out of the Liberties of the City, and whatever Practice there were to disparage her in her Marriage, it would be dispensable by them; and Notice in this case is impossible to be given, but most easie to be taken; for what more proper than for a Man to inform himself of the Condition of her, whom he intends to make



make his Wife? and if Notice were requisite, it must be given to all the Men in England capable of Marriage; and in what manner should that be? by fixing it like a Proclamation to some notorious place in the County? Yet it would be then hard to maintain that a Man was bound to take Notice of such a thing. The Statute of this King, that takes away the Court of Wards, saves and confirms the Jurisdiction of the Court of Orphans in London, which being in a general Law is within every Man's Notice; for the Case of taking away a Man's Servant in a Foreign County to that he was retained in, is not like to this, for if he be detained after Demand made, he which first retained him may have an Action, and so is at no loss; but here there is no Remedy by undoing the Marriage, and therefore 'tis fit the Rashness of it should be punished. This Custom concerning Orphans is not confined to the Walls of London in many particulars. All the Children of a Freeman, tho' he dies, and they were born out of London, shall yet be Orphans; If a Legacy be bequeathed to a City Orphan in any Foreign County, the Executor, &c. shall be compelled to give Security to the Court of Orphans for the Payment of it. Et vid. Luch's Case, in Hob. 247. The interest of the City adheres to the person of the Orphan where-ever he is; as a Citizen of London shall have his personal Privileges in all places, as exemption from Toll, Pilage, (Quære the last) (per Hale.) And as well as they may have a Raviſhment de gard in what County soever the Orphan was taken, so they may punish an unlicensed Marriage. Waler's Case, 22 Jac. was the same with this which was resolved for the City. It appears by the Return that Harwood was present in Court; and Hale said, they could not award Process into a Foreign County.

3. It doth not appear by the Return, that the Mayor and Aldermen are to have the fine, and then it shall not be so intended. But in Eastwick and Langham's Case, (which Langham was fined for refusing the Office of a Sheriff, being a Freeman;) it was held they might set the fine, tho' they were to have it themselves.

4. It was held the fine was not excessive: But in regard there was no disparagement by the Marriage, it was propounded by the Court, that upon the submission of Harwood to the Court of Orphans, that they should do well to remit the fine.

St. Aubin *versus* Cox.

1 Mod. 60,  
81.  
Ante 88.  
2 Keb. 853,  
854.

**A** Prohibition was prayed to the Court of the Compter in Woodstreet London, to an Action of Debt there commenced; for that the Defendant had pleaded before any Imparllance taken, That the Cause of Action did arise at a place out of their Jurisdiction, and offered to have sworn his Plea, and they refused to accept this Plea.

Upon

Upon this Matter a Prohibition was granted; for Inferiour Courts have not Cognizance of Transitory things, which arise in places out of their Jurisdiction, as F. N. B. 45. is: But then 'tis not sufficient to surmise such Matter for a Prohibition; but a Plea to that effect must be tendered in the Inferiour Court, and that before any Imparance taken (whereby the Jurisdiction would be admitted) and it must be upon Oath; and then if refused, a Prohibition shall be granted; or upon such Refusal, a Bill of Exceptions may be made, and Error assigned. Fitz. N. B. 21. N. <sup>2 Mod. 273.</sup> <sup>Postea 333.</sup>

The King *versus* Serjeant and Annis.

They were indicted of Perjury committed in their Evidence, given upon an Indictment of Barretry against Nurse (the Record of which was recited in this Indictment, and therein it appeared that the Venire was made returnable coram J. S. & J. N. Justiciariis prædictis, and at a day certain,) and Judgment given, and Error brought and assigned, that the Venire being returnable coram Justiciariis prædictis, none but the same Justices could proceed, and not those who sat the next Assizes by virtue of a new Commission: And therefore the Proceedings before them were coram non Iudice, and so no Perjury could be committed. <sup>2 Keb. 718.</sup> <sup>854.</sup>

Secondly, The Venire should not have been returnable at a Day certain, but ad proximas Assisas; because 'tis uncertain when the Assizes begin, and if they should fall out to begin upon the very Day, yet it would not help the Error in the first award of the Venire. Sed non allocatur;

For the Statute of 1 & 2 E. 6. enables new Commissioners of Oyer and Terminer to proceed where the former left, before whom the Matter commenced.

And for the other Exception, it makes the Proceedings only erroneous; and while the Record stands unreversed, the Perjury may be well assigned. It was said at the same Assizes, that the Judges may adjourn to a Day certain; but if there be a Continuance over to the next Assizes, there must be no day expressed. But Inferiour Courts cannot make a Continuance ad proximam Curiam, but always to a Day certain. <sup>Raym. 74.</sup> <sup>1 Sid. 148.</sup> <sup>Cr. Car. 254.</sup> <sup>contra.</sup> <sup>2 Mod. 59.</sup> <sup>1 Mod. 81.</sup> <sup>Raym. 205.</sup>

Stanlack's Case.

Upon an Inquisition super visum Corporis before the Coroner, it was found, That he died of a Pegrin at Greenwich. <sup>1 Mod. 82.</sup> <sup>2 Keb. 859.</sup>

Sir Edward Thurland moved for a Melius Inquirendum, producing several Affidavits, That Stanlack was riding in the Highway, and a Coach with six Horses rushing by him, cast him from his Horse,



horse and kill'd him; and that divers offer'd to prove this before the Coroner, and he would not hear them: And if this Enquest should stand, the King would lose his Deodand; and alledged, that there were several Precedents of this Nature, as in one Michael Bartholomew's Case, and Toom's Case, who hanged himself at Hackney about 15 years since.

The Court said in those Cases it was proved, That there was Practice with the Coroner to suppress the King's Evidence, and so the Inquisition was set aside upon a Male se gessit. If a Coroner omits to enquire, this Court, as Supream Coroner throughout England, may enquire; or may make Commissioners to enquire; or Commissioners of Oyer and Terminer may enquire; but then it is not Super visum corporis, and therefore may be traversed. But Hale said, Where a Coroner hath enquired, no Melius Inquirendum can go, as upon an Office found after the Death of the King's Tenant. For unless they could take some Exception to the Inquisition to quash it, the Coroner could not enquire again; but if he Misdeemeanour of the Coroner were somewhat more clearly made out, the Court said they would set the Inquisition aside, and cause a new one to be made.

#### Maynard's Case.

<sup>1</sup> Mod. Rep. 283.  
<sup>2</sup> Keb. 873. **H**E being produced as a Witness in an Action of Trover against Reynell, Corey and others, for 1200 l. which the Defendants were charged to have conveyed away, which was the Money of Mr. Luttrell, lately deceased, and belonged to Mrs. Luttrell, now Plaintiff, as Executrix, he swore, that the Defendants had the Money, and carried it out of the house wherein Mr. Luttrell died; and upon his Evidence principally the Jury found the Defendants Guilty.

Now the last Easter Term, which was about a year and an half since the Trial, Maynard made an Affidavit in the King's Bench, that Mrs. Luttrell had arrested him among the rest, for the taking away of this Money; and he being unable to put in Bail, and apprehensive of the Ruin that lying in Prison would bring upon him, he applied himself to Mrs. Luttrell, who promised him favour, so that he would accuse Reynell and the other Defendants with the taking of the Money, and be a Witness against them; and that he was examined before a Justice of the Peace, (one A.) who did much urge him to depose against Reynell in this Matter. And that by their Threats and Promises he was brought to give false Evidence, and that what he said in his Testimony, relating to the Defendants taking away the Money, was untrue. After this Affidavit made he was indicted of Perjury, in what he witnessed in the Action of Trover, and confessed the Indictment.

Mrs.

Mrs. Luttrell thinking this matter might disparage her Verdict, brought an Information against him of Perjury committed in his Affidavit, to which he pleaded Not Guilty, but before the Trial made an Escape, so that at the Day the Enquest was taken by Default.

The Court were at first in doubt, whether they should proceed upon the Information; the King having taken his Confession upon the first, it seemed contradictory and repugnant to prosecute him upon this: But in regard the Affidavit charged Mrs. Luttrell and others with having suborned him to perjure himself, he might be tried upon that as another distinct Perjury, if so be they should be clear of having practised with him. And upon the Trial of this Information it did appear that he had charged them falsely, and so found Guilty.

Another Matter was moved, That the Indictment alledged the Perjury to be committed in Middlesex; whereas it appeared by the Affidavit produced, that it was taken at Justice Twisden's Chamber, in the Inner Temple; wherefore it ought to have been tried in London, where the Oath was taken; and though the Affidavit were filed in Court, that would not help it. But the Court agreed, If it had been in an Indictment it had been a good Objection, for there the Offence is local; but otherwise they said it had been held in an Information. And Twisden said, That if a Recognizance was taken at a Judge's Chamber in London, and after filed in Court, the Scire facias upon it shall go first into Middlesex: However the Court offered to have this Matter found Specially; but there being no Counsel for Maynard, and this Matter stirred only per amicum Curiae, it went off.

#### Austin's Case.

**I**n an Indenture for erecting of Posts and Rails in an High-way, Postea 189. It was held necessary to prove, that the Party indicted did set them up; for a Continuation of them, or not suffering them to be removed, would not serve.

Hale. If there be no Special Matter to fix it upon others, the Parish where the High-way is, ought to repair it of Common Right. (Sed Quære, Why not the County? as in the Case of Common Bridges, 2 Inst. 701.) Vide Postea 189. Ante 90.

#### Butcher versus Cowper.

**I**n an Indebitatus Assumpsit, the Defendant pleads in Abatement, 2 Keb. 877. That the Promise was for carrying the Goods of the Defendant to a certain Place; and if there were any such Contract, it was made with the Plaintiff and a Stranger. Upon which it was demurred;



demurred; because to plead, if there were any such Contract, is not good, and more like an Affidavit to change a Venue, than pleading, and he ought to have averred that the Stranger was alive: Besides the Defendant had taken an Imparlane, and therefore could not plead in Abatement. Wherefore it was adjudged for the Plaintiff.

Smith *versus* Butterfield.

<sup>2</sup> Keb. 878. **I**N Trespass Quare clausum fregit & bona asportavit; the Defendant pleaded Not Guilty to the breaking of the Close, and justifies the taking of the Goods at a time varying from that alledged in the Declaration, and concludes Quæ est eadem transgressio, upon which it was demurred; because he did not traverse the Time before and after it; and it was adjudged for the Plaintiff.

Toll *versus* Dawson.

<sup>2</sup> Keb. 878. **I**N Debt upon a Bond conditioned to perform an Award. The Defendant pleaded Nullum fecerunt Arbitrium. The Plaintiff replies, and sets forth the Award, which did express the Bond of Submission to be dated the 7th of February, whereas it was dated the 10th of February; and for that Mistrecital the Defendant demurred.

But the Court held clearly, That it did not hurt the Award: And so if the Submission had been of divers particular matters, yet if they had meddled only with the things submitted, it had been well enough.

Proctor *versus* Newton.

<sup>2</sup> Keb. 878. **I**N Debt upon a Bond, the Defendant demanded Oyer of the Condition, which was to perform Covenants in an Indenture; which <sup>3</sup> Keb. 41. <sup>2</sup> Lev. 37. recited, That the Defendant had sold to the Plaintiff a certain House, and there was a Covenant that the Plaintiff pacifice gauderet domum prædictæ absque legali interruptione disturbantia sive impedimento of the Defendant, or any claiming from or under him. Upon this Covenant the Plaintiff assigned the Breach thus: That J. S. habens jus & titulum virtute concessionis from J. N. ante tempus confectionis of the Bargain and Sale to him, did enter and expel him: Upon which it was demurred, because not shewn that J. S. had a lawful Title, and therefore not well applied to the Condition, which is so expressly penned. <sup>2</sup> Cro. 315.

<sup>2</sup> Saun. 178. Hale. Habens jus implies it was a lawful Eviction. <sup>1</sup> Mod. 101. Twisden doubted, because it may be J. N. disseized the Defendant before the Bargain and Sale, and made a Lease to J. S. Et adjournatur. <sup>1</sup> Lev. 207.

Freeman

Freeman *versus* Boddington.

**E**rror of a Judgment in an Assumpsit against Baron and Feme, in Com' Banco; The Error assigned was; Hill. 21, 22.  
Rot 126.  
That the Feme was an Infant, and appeared by Attorney; 2 Keb 878.  
2 Lev. 38.  
whereas the Court ought to have admitted her per Guardianum. But if the Wife be of Age, then the Baron makes an Attorney for her and himself, and the Entry is per Attornatum of the Baron and Feme, and not the Baron only: And for this Cause the Judgment was reversed.

And Hale said, That the Baron could not disavow the Guardian made by the Court for his Feme.

Lewyn *versus* Forth,

**T**he Case was, Magdalen College in Oxford being seised of an House and a Mill, demised it to Lewyn for 31 Years: Covenant.  
2 Keb, 879.  
Lewyn let the Mill to J. S. for five Years, and after demised the House and Mill to Forth by Indenture for 31 Years: Forth covenanted to repair the Premises durante termino predict' 31 annorum: J. S. refused to attorn; and whether Forth were bound to repair the Mill was the question; because it was alledged, That the Covenant was to repair during the Term, and nothing in the Mill passed during the five Years for want of Attornment. But it was resolved, That he was bound to repair: For Hale said, Tho' the Lease did not commence in point of Interest, yet it did in point of Computation; and this Covenant was to repair during the 31 Years.

Zouch *versus* Clay.

**T**Rin. ult. Rot. 787. In Debt upon a Bond, the Defendant pleaded, 2 Lev. 35.  
Mo. 619.  
That at the time that he sealed and delivered the Bond, there was a Space left, wherein afterwards the Name of J. S. was put 2 Keb. 872,  
881.  
in, who also sealed and delivered it; supposing that the adding another Obligor, bound jointly and severally with him, was an Alteration material to avoid the Bond, and rely'd upon Pigot's Case in the Kellewey  
162, 164.  
1 Cro. 627,  
Mo. 547.  
11 Co.

But the Court held, That the Bond remained the same as to him, and he could not take Advantage of this matter; and 'tis the common Practice of Sheriffs, to make their Bonds for Appearance in this manner.



Sands *versus* Rudd.

**I**N Debt upon a Bond, conditioned to give Security by a certain Day, as the Chamberlain of London shall appoint.

The Defendant pleaded, That there was no Chamberlain of London at the Day. Upon which it was demurred, and adjudged for the Defendant.

Parsons *versus* Perus.

1 Mod. 91.  
2 Keb. 872,  
880.  
2 Lev. 34.

**H**ILL. ult. Rot. 1051. In an Ejectment, upon a Special Verdict the Case appeared to be thus: Two Women were Joint-tenants in Fee; one of them made a Charter of Feoffment to J. S. and Livery within the View, and after (before it was executed) married him.

And it was objected, That this was not a good Feoffment. None will deny, but that the Death of either Party makes a Livery within View (if not executed by Entry) ineffectual. And in Mo. 85. Dyer 5. If there be not an Entry immediately, a Livery within the View is not good; and in this Case, by the Marriage, he becomes seised in the Right of his Wife, and cannot by his own Act divest himself of that Estate, or work a prejudice to his Wife, by putting the Estate out of her. Which makes it differ from the Case of the 38 E. 3. 11. b. where a Man made Livery of the Land within View to a Woman; and before she entered, married her, and claimed the Estate in Right of his Wife; there held to be a good Feoffment: For in that Case, there is no Alteration of the Estate consequent upon the Intermarriage. Neither is it like the Case of 2 R. 2. quoted in Forse and Hemling's Case in the 4 Co. where a Woman grants a Reversion to a Man, and they intermarry before Attornment: For there the Grant is to be perfected by the Act of a Stranger, which in reason should be more available to a Man than his own Act.

But it was resolved by all the Court, That this Livery was well executed after the Marriage: For an Interest passeth by the Livery in View, which cannot be countermanded. The effectual part of it, (viz.) Go Enter, and take Possession, was before the Marriage, tho' the Estate is not in the Feme while Entry. She hath done all on her part to be done, and hath put it merely in the Feoffor's Power, and when he enters it hath a strong Retrospect to the Livery, and shall be pleaded as a Feoffment when she was sole. If two Women exchange Lands, and one marries before Entry, this shall not defeat the Exchange. The Case of 2 R. 2. and 38 E. 3. are as strong.

1 Mod. 91.

Emerson *versus* Emerson.

**T**Rin. ult. Rot, 1389 Error of a Judgment in the Common Pleas, in an Action of Trespass by the Plaintiff as Executor, upon the Statute of 4 E. 3. De bonis asportatis in vita Testatoris. The Plaintiff declared, That the Defendant blada crescentia upon the Freehold of the Testator, messuagium, defalcavit, cepit & asportavit. 2 Keb. 874.

Upon Not guilty pleaded, a Verdict and Judgment was for the Plaintiff, and assigned for Error, That no Action lay for Cutting of the Corn; for that is a Trespass done to the Freehold of the Testator, for which the Statute gives the Executor no Action, and while the Corn stands, 'tis to many purposes parcel of the Freehold. So that if a Man cuts Corn and carries it away presently, tho' with a felonious intent, 'tis no Felony: Otherwise, if he let it lie after 'tis cut, and at another time comes and steals it. So that it appears for parcel of the Trespass no Action lies; then entire Damages being given as well for the cutting, as carrying away of the Corn, the Judgment is erroneous. 1 Mod. Rep. 89.

But all the Court were of another Opinion; for 'tis but one entire Trespass; the Declaration only describes the manner of taking it away. Indeed, if it had been quare clausum fregit & blada asportavit, it had been naught; or if he had cut the Corn and let it lie, no Action would have lain for the Executor. So if the Grass of the Testator be cut, and carried away at the same time; because the Grass is part of the Freehold, but Corn growing is a Chattel. The Statute of 4 Ed. 3. hath been always expounded largely. 2 Keb. 875.

## Mr. Amhurst's Case of Grays-Inn.

**S**erjeant Maynard moved for a Mandatory Writ to the Mayor and Court of Aldermen of London, upon the Statute of 13 Car. 2. c. 11. to give Judgment according to the late Act of 22 nunc Regis. The Case was, That the Act appoints a Market to be on certain Ground set out in New-Market; and in all such Cases, for the satisfaction of the Owners of the Ground, (if the City cannot agree with them for it) it empowers the Mayor and Aldermen to empanel a Jury, who shall assess and adjudge what Satisfaction and Re-compense shall be given to the Owners; and says, That the Verdict of such Jury on that behalf to be taken, and the Judgment of the said Mayor and Court of Aldermen thereupon, and the Payment of the Money so awarded or adjudged, &c. shall be binding and conclusive to and against the Owners, &c. Raym. 214. 2 Keb. 871.



Now there was Fifteen thousand Foot of Amhurst's Ground taken away for this purpose, and a Jury had been empannelled, and had assessed and awarded him two Shillings a Foot; but the Mayor and Court of Aldermen refused to give Sentence or Judgment thereupon: This, says he, is a Ministerial Thing, and this Court will interpose when any Officers will not do Justice, or will out-go their Authority: For there is the same Reason to command to do Justice, as to prohibit Injustice. A Bishop of Exon had fallen out with a Town in Cornwall, and denied them Chrism; and a Mandamus went hence, to command him to give it them. Mr. Noy brought in a Copy of it.

Sir William Jones. This somewhat resembles a *Procedendo ad Judicium*; this is stronger than the Case of commanding a Bishop to grant Administration; there this Court commands them to observe a Statute, tho' it be in a Matter this Court has no Cognizance of. We cannot have an Action on the Case.

Hale. If they do not make you Satisfaction, your Interest is not bound.

Maynard. But that is taken away by the same Act, (Page 143. 4.) We are Lessee to the Dean and Chapter of St. Paul's.

Hale. 'Tis not enacted, That they shall give Judgment; but that is implied: I never knew a Writ, commanding to grant Administration, tho' the Opinion has been so.

Sir William Jones. That was done in Sir G. Sandys's Case, after great Debate.

Then a Rule was made to shew Cause why a Writ should not go.

Afterwards the Court granted a Writ, but willed them to consider well of the Form, and to whom to direct it.

Lloyd *versus* Brooking.

2 Keb. 872,  
881.  
2 Lev. 35.

2 Saund. 382.  
1 Mod. 92.

2 Sid. 65.

**T**RIN. ult. 1046. The Case was, Tenant for Life, Remainder to his first Son in Tail, Remainder to J. S. for Life, Remainder to his first Son in Tail, &c. Tenant for Life after the Birth of his first Son, accepts a fine from J. S. to certain Uses; and then makes a Feoffment, after which the Son of J. S. is born; and whether his Contingent Remainder were destroyed, or should vest in him, was the Question? And it was resolved by the whole Court, upon the first Opening, That the Contingent Remainder was not destroyed; the Acceptance of the Fine displaced nothing, the Feoffment divested all the Estates, but the Right left in the first Son in Remainder, supported the Contingent Remainders. My Lord Coke's Case, 2 Roll. 796, 797. is stronger: He covenanted to stand seised to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his Daughter for Life, (when born) Remainder to her first Son

in Tail: And minding to disturb the arising of the Contingent Estates, attempted it by these two Means:

First, he grants the Reversion, and in the Grant recites the former Settlement; which Grant was without Consideration;

And Secondly, makes a Feoffment: And it was resolved, That the Grant should not hinder the arising of the Contingent Use, because the Grantee had Notice, and was therefore subject to the Covenant, to stand seised by the Grantor; and that the Feoffment should not destroy the Contingent Estate, because the Right of Remainder for Life in the Daughter, upon which she might have entered for the forfeiture, did support it, tho' indeed the Remainder for Life in the Wife would not; for the Feoffment by the Husband tolls her Right during the Coverture, cui contradicere non potest; upon which Reason is Biggot and Smith's Case adjudged, 3 Cro. Now this is stronger than the Case at Bar, because the Settlement was by way of Use, but here by Act executed. The Case of my Lord Coke was adjudged by Rolle in Banco Regis, and after by Glyn. It hath been the most common way of Conveyancing, to prevent the disappointing Contingent Estates, to make Feoffments, &c. to the use of the Husband, &c. for Life, Remainder to the use of the Feoffees for the Life of the Husband, and so on to Contingent Remainders; and the more modern ways have been to make the first Estate but for Years; but in both Cases, he which hath the first Estate, cannot destroy the Remainders. Car. 102. 1 Saund. 382. It hath been a question, Whether a right of Action would support a Contingent Estate? but never doubted but that a right of Entry would. Vide Archer's Case, 1 Co. 66.

#### Katherine Austlin's Case.

**A**N Indictment was found against her, that she vi & armis a certain part of the King's High-way, (leading from Shorditch Church to Stoke Newington through Hogsdon) postibus & repagulis inclusit, &c. Ante 90, 183.

Upon a Trial at Bar, the principal Question was, Whether the place where the Obstruction was, were an High-way?

Hale said, If a way lead to a Market, and were a way for all Travellers, and did communicate with a great Road, &c. it is an High-way; but if it lead only to a Church, to a private House or Village, or to Fields, there it is a private Way. But 'tis a matter of Fact, and much depends upon Common Reputation. If it be a publick way of Common Right, the Parish is to repair it, unless a particular Person be obliged by Prescription or Custom. Private Ways are to be repaired by the Village or Hamlet, or sometimes by a particular Person. In the Case at Bar, it was found no High-way. Ante 90, 183.



Castilian *versus* Platt.

2 Keb. 877.

**E**rror of a Judgment in Communi Banco, in a Scire facias against three Executors, the Error assigned was, That one was an Infant.

Hale. No doubt a Scire facias lies against him; and seeing this Case is, That he did not appear, Judgment was well given against him.

Simon Morfe *versus* William Slue.

Postea 238.

Raym. 220.

1 Mod. 85.

2 Keb. 806.

3 Keb. 72. &amp;c.

Molloy 209,

210.]

2 Lev. 69.

**M**ichael. ult. Rot. 421. An Action upon the Case was brought by the Plaintiff against the Defendant; and he declared, That whereas according to the Law and Custom of England, Masters and Governours of Ships which go from London beyond Sea and take upon them to carry Goods beyond Sea, are bound to keep safely Day and Night the same Goods, without Loss or Substraction, ita quod pro defectu of them, they may not come to any Damage; and whereas the 15 of May last, the Defendant was Master of a certain Ship called the William and John, then riding at the Port of London, and the Plaintiff had caused to be laden on Board her three Trunks, and therein 400 pair of Silk Stockings, and 174 pounds of Silk, by him to be transported for a reasonable Reward of Freight to be paid, and he then and there did receive them, and ought to have transported them, &c, but he did so negligently keep them, that in default of sufficient care and custody of him and his Servants, 17 May, the same were totally lost out of the said Ship.

Upon Not guilty pleaded, a Special Verdict was found, (viz.) That the Ship lay in the River of Thames, in the Port of London, in the Parish of Stepney, in the County of Middlesex, prout, &c.

That the Goods were delivered by the Plaintiff on Board the Ship, prout, &c, to be transported to Cadiz in Spain.

That the Goods being on Board, there were a sufficient number of Men for to look after and attend her, left in her.

That in the Night came 11 Persons on pretence of pressing of Seamen for the King's Service, and by force seized on these Men (which were 4 or 5, found to be sufficient as before) and took the Goods.

That the Master was to have Wages from the Owners, and the Mariners from the Master,

That she was of the Burthen of 150 Tun, &c.

So the Question was upon a Trial at Bar, Whether the Master were chargeable upon this matter?

It was insisted on for the Plaintiff, That he who took Goods to carry them for profit, ought to keep them at his peril.

To which it was answered, That there was no negligence appear'd in the Master. By the Civil Law, if Goods were taken by Pirates, the Master shall not answer for them; and this is not the Case of a Carrier, for tho' here the Goods are received at Land, yet they are to be transported, and being one intire Contract, they shall not be under one Law in the Port and another at Sea; the Master is not liable in case of Fire or sinking the Ship; every one knows the Ship is liable to inevitable Accidents, and there is no Case of this nature in Experience. And Serjeant Maynard added, That this differed from the Case of a Carrier, for that he is paid by the Owner of the Goods; but here the Master is Servant to the Owner of the Ship, and he pays him, and not the Merchant. Owen 57.

The Court inclined strongly for the Defendant, there being not the least negligence in him: but it was appointed to be argued, but since I've heard it was compounded. It was agreed on all hands, that the Master should have answered, in case there had been any Default in him, or his Mariners. Raym. 210. That Judgment was given for the Plaintiff. Postea 238.

Anonymus.

**U**Pon a motion for Restitution after the Reversal of an Outlawry, Hale said, that he must plead the Reversal to the seizure in Scaccario. 2 Keb. 871.

Puckle *versus* Moor.

**M**ichael. ult. Rot. 461. A Promise was made seven Years since, to pay Money within three Months after. 1 Mod. 71, 89.

The Defendant pleaded Non Assumpsit infra sex annos ante exhibitionem Billæ, whereas it should have been causa Actionis non accrevit infra sex annos; Tho' in this Case it appears within the Declaration, that the Time of Payment was not within six Years before; yet because the Defendant had not pleaded it, he cannot have Advantage of it. Cr. Car. 139. 2 Keb. 874.

Goff *versus* Lloyd.

**M**ichael. ult. Rot. 268. Trespass quare domum fregit, and took away so many Nails, &c. 2 Keb. 829, 880.

The Defendant pleads Specially, and sets forth the two Aars for Hearth-money, 14 Car. nunc cap. 10. and 16 Car. nunc cap. 3. in pursuance of which he distrained the said Nails, for the Duty due by those Aars out of a Smith's Forge, &c. Postea 311, 312.

The Plaintiff demurred: So the sole Question was, Whether a Smith's Forge were within the Aars? It being once argued the last Term, the Court now gave their Opinion.

Moreton.



Moreton. I think a Smith's Forge ought to pay; 'tis a great part of the King's Revenue, almost in every Village there is one, We should explain the Act liberally for the King.

Rainsford of the same Opinion: 'Tis within the Words, (scilicet) an hearth whereon Fire is used, and within the meaning, for there is an exception of things not so properly Fire-hearths as this, (viz.) Private Ovens. Where the Act excepts Blowing Houses, I take it is meant Glass-houses, and the Houses at Iron-works; by Stamps I thing is meant Presses, Calenders for Cloaths; by the very Words, Houses that are not Dwelling-Houses are charged. The Objection that it is his Trade, is answered by the instance of Cooks, Chandelers, Common Ovens, Hearths of Cripe-women, who boil Neats-Feet.

Twisden of the same Opinion. The Words are general, yet I would not extend it to every hearth that has a fire upon it, as Stills and Alembicks, for so we might extend it to a Chafing-Dish of Coals; but we must take it for a Rule, to extend it to those things which are most general. A Smith's Forge is of such use, that 'tis found almost in every Village; therefore 'twas reckoned a great piece of hardship and slavery upon the Children of Israel, that they were not permitted a thing so useful amongst them. The Exceptions enumerate Particulars, therefore it excludes whatever is not expressed.

Hale. I would fain know how the Fact is. Do Silver-Smiths, &c. pay? It were too narrow to extend it only to common Chimneys, and too great a latitude to extend it to every place where Fire is, where a Man can but warm his Hands. I suppose Bolders in Cooks Chimneys, and the Fire-places of Waxed-combers do not pay. Common Ovens should have paid, tho' there were no exception of Private Ovens; for they never are, or can be without a Chimney. This is matter of Fact I have not enquired into, and I would be loath to deliver an Opinion without much inquiry; but 'tis very probable that they are Fire-hearths, and not excepted; but it appears plainly upon the Record, that 'tis a Fire-hearth, and by the general Demurrer 'tis admitted.

Note, There was a Special Rule, That no advantage should be taken of the Pleading by either side. But Hale said, he did not know how they were bound by that Rule.

Termino Paschæ, Anno 24 Car. II.

In Banco Regis.

Monk *versus* Morris and Clayton.

**T**HE Plaintiff after he had obtained a Judgment in Debt became Bankrupt, and the Defendants brought a Writ of Error. 1 Mod. 93.  
3 Keb. 1, 14,  
68.

The Judgment was affirmed in the Erchequer-Chamber, and the Record sent back.

Then a Commission of Bankrupts is sued out, and the Commissioners assign this Judgment.

The Plaintiff sues out Execution, and the Money is levied by the Sheriff and brought into Court.

The Assignee moves, That it may not be delivered to the Plaintiff, surmising that the Judgment was assigned to him, *ut ante*.

The Court said, They might have brought a Special Scire facias, which they having delayed, and that it would be hard to stay the Money in Court upon a bare Surmise, and so ought appeared, it was the Plaintiff's Due. But however, because it might be hazardous to deliver it to him, they consented to detain it, so that the Assignee forthwith took out a Scire facias against the Defendant, in order to try the Bankruptcy; or otherwise, that it should be delivered to the Plaintiff.

Sir Ralph Bovy's Case.

**I**N an Ejectment upon a Trial at Bar, the Case appeared to be this; Sir William Drake was seized in Fee of the Lands in question, and 19 Car. 1. infeoffed Sir William Spring, and five others, to such Uses as he should declare by his Will in Writing, or by his Deed subscribed by three Witnesses. In August 20 Car. 1. by his Deed, *ut supra*, he limits the Use of the said Lands to his Brother Francis Drake for 90 Years, and declares, That the feoffees should be seized to their own Use, in Trust for the said Francis Drake and his Heirs, with a Power to Francis Drake to alter and limit the Trust as he should think fit. 1 Sid. Jennet  
and Coole's  
Case, 223,  
244, 262.  
3 Keb. 6.

In the same Month there is a Treaty of Marriage between F. D. and the Daughter of Sir William Spring; and it was agreed by certain Articles between F. D. and Sir W. S. &c. reciting that he should receive 2500 l. with his intended Wife, (which Money was proved to be paid,) that F. D. should convey the Lands in question to

C c

himself



himself and his Wife, and the Heirs Males of their two Bodies, &c. for the Jointure of the Wife.

The Marriage afterwards in 20 Car. takes effect, and soon after the same Year F. D. by Indenture between him, Sir W. S. and another, reciting the Articles of Marriage, assigns his Term of 90 Years to Sir W. S. and the other in Trust to himself for Life, the remainder to his Wife for Life, and after to the Heirs Males of their two Bodies; and by the same Deed limits the Trust of the Inheritance of the Lands in the same manner.

Afterwards in 23 Car. 1. he in consideration of 6000 l. (proved to be paid) grants out of the said Lands a Rent of 400 l. per annum, to Sir Ralph Bovy and his Heirs, with Power to enter into the Land, in case the Rent was not paid, and to retain it until Satisfaction.

Afterwards F. D. and his Wife die, the Rent was arrear. Sir R. Bovy enters, Sir Will. Spring and the other Trustees assign the term of 90 Years to Sir Will. Drake, Heir Male of F. D. and his Wife the Lessor of the Plaintiff. In this case, these Points were agreed by the Court.

Cro. Car. 39. First, That when Sir W. D. enfeoffed divers to such Uses, as he should declare by his Will in Writing; That if he had in pursuance of that Feoffment limited the Uses by his Will, that the Will had been but Declaratory, tho' if he had made a Feoffment to the Use of his Will, it had been otherwise, according to Sir Ed. Cleer's Case, 6 Co. 18. And Hale said, my Lord Co. made a Feoffment, (provided that he might dispose by his Will) to the use of the Feoffee and his Heirs; and resolved in that case he might declare the Use by his Will, which should arise out of the Feoffment,

2 Cro. 153, 454. Secondly, That this Settlement being in pursuance of Articles made precedent to the Marriage, had not the least Colour of Fraud, whereby a Purchaser might avoid it; and if there had been but a verbal Agreement for such a Settlement, it would have served the turn. And the Court said, If there had been no precedent Agreement, so that it had been a voluntary Conveyance, tho' every such an one carries an Evidence of Fraud; yet is not upon that account only always to be reckoned fraudulent, or to be avoided by a Purchaser upon a valuable Consideration.

1 Mod. 119. Thirdly, Whereas it was objected, That the Trust of the Term, which was but a Chattel, could not be entailed, and therefore the Term was liable to the Rent notwithstanding the Assignment of it, and limiting the Trust as before,

It was answered and resolved by the Court; That if it had been a Term in Gross in F. D. the Trust of it could have been no more entailed than the Term it self, but F. D. having the Term in Point of Interest, and at the same time the Trust of the Inheritance, might entail the Trust of the Term to wait upon the Inheritance;

and

and that the Chancery does every Day allow, which they should take notice of. 2 Vent. 213,  
214.  
2 Cro. 68.

But then it was objected, That he ought to have limited the Trust of the Inheritance, and of the Term both together; but F. D. by a distinct Clause in the Deed limits the Trust of the Term which divides it, and makes it independent upon the Inheritance, the Trust of which he limits by another Clause.

To that it was said by the Court, That tho' the Limitations were by several Clauses, yet all must be taken as one entire Conveyance. And Hale said, That in 1646, a Lease for Years was assigned, and the Trust of it entailed, and two Days after the Trust of the Inheritance entailed in the same manner; and it was held by the best Counsel then in England, That tho' this were done by several Deeds, and at several Times, yet being in Pursuance of one Agreement, that all was to be taken as one entire Act, according to the Case of 17 Jac. where a Fine was levied to Lessee for Years, with an intent that he should suffer a Recovery, which was had the Term following, and resolved, That his Term was not drowned. The Jury hearing the Opinion of the Court, found for the Plaintiff for all, save a 12th part, for so much was drowned and surrendered by the Assignment of F. D. to Sir W. S. one of the six Joint-tenants of the Reversion. Postea 2So.

#### Wood versus Coar.

**A**N Action for Words, That the Defendant being indicted of a forcible Entry at the Sessions, and the Plaintiff produced as a Witness for the King, and swore nothing but what was true; the Defendant after habens colloquium of the said Oath said, The Plaintiff took a false Oath against me at the Sessions, innuendo the said Oath, &c.

After Verdict for the Plaintiff it was moved, That the Action did not lie, for the Defendant might mean an Extrajudicial Oath. In Pritchard's Case, 2 Rolle, where one said of him, He took a false Oath against me at the Assizes, it was held, That the Action did not lie. Sed non allocatur; for in that Case there was no colloquium laid, which is alledged in this Case, and shews to what the Words spoken did relate.

#### Broadnox's Case.

**A** Habeas Corpus was brought to remove the Body of Broadnox, who was taken by Process upon a Plaint exhibited in the Court of the Sheriffs in London, and it was returned, That time out of mind the Mayor, Aldermen and Common Council of the City, have had the Government and Regulation of Trade within Raym. 289.  
3 Keb. 10,  
214.



the City, and Power to make By-laws concerning the same; and that they had made a By-law, that there should be but 420 Carts allowed to work within the City, all which should be licenced by the President of Christ's Church Hospital, and that there should be paid for the Licence of every Cart 1 l. Fine, and 17 s. per annum to the said President, to be employed for the use of the Poor within the Hospital; and that none should use a Cart without such Licence, under a certain Penalty to be recovered, &c. Provided, That all Persons may send their own Carts to the Wharfs, &c. and carry Goods in their own Carts from Wharfs, except such as shall be Traders or Retailers in Fuel.

That B. without such Licence wrought with a Cart pro lucro suo proprio, and for the Penalty forfeited thereupon, a Plaint was levied again him, &c.

1 Sid. 284.  
Ante 21.  
2 Keb. 27.  
873.

It was prayed, That there might be no Procedendo in this Case; for tho' the By-law should be admitted to be good, having Custom to warrant it, as was adjudged in this Court, 19 Car. nunc between Player and Jenkins; yet it appears that the Plaint is insufficient, for in that, no Custom is alledged; and in 1 Roll. 364. such a By-law to limit the number of Carts was held void, for there no Custom is alledged to ground it upon; and then a By-law cannot restrain Trade.

Again, 'Tis unreasonable that such as trade in Fuel should not be permitted to bring home the Wood, which they buy in the Country in their own Carts, or to carry it out to their Customers; for tho' they might limit the number of Carmen, which in too great a multitude would be a Nuisance, and infest the Streets, yet they cannot restrain a Man from using his own Carts, to carry his own Commodities.

Postea 256.  
1 Mod. 96.

As to the first the Court were of Opinion, That it was not necessary to mention the Custom in the Plaint, for 'tis Lex loci, and they take notice of their own Customs in their own Courts; As in Norwich the Custom is, That in Debt upon a Specialty the Debtor faterur scriptum, sed petit quod inquiretur de debito, and no Custom is set forth in the Record to warrant that. But here in the Habeas Corpus they have returned the Custom, which shews they had good cause to proceed upon their Plaint; for it hath been often resolved, that Custom may create a Monopoly, as the case in the Register is; a Custom was, That none should exercise the Trade of a Dyer in Rippon, without the Archbishop of York's Licence.

As to the second the Court doubted, Whether this By-law could be adjudged reasonable or good, because it would restrain the Woodmongers from bringing their Wood, &c. home in their own Carts; so that tho' they brought it in the Country-Carts as far as the Liberties of the City, they must then unload and put it in City-Carts, which would be extremely inconvenient, and so it

would be if they should send City-Carrs to fetch it; and tho' it Raym. 288. might be reasonable to prohibit their carrying of their Commodities 324. out in their own Carrs, that they might not have so great an opportunity to cheat in their Measures; yet there could be no Colour to restrain them from bringing them in. Et adjournatur.

*Cuts versus Pickering.*

**U**PON a Trial at Bar, one Baker (who had been Solicitor for 3 Keb. 2. Pickering) was produced as a Witness concerning the Rasure of a Clause in a Will, supposed to be done by Pickering.

The Court were moved, Whether he could be examined touching this, because having been retained his Solicitor, he should by reason of that be obliged to keep his Secrets: But it appearing that B. had made this Discovery to him, (of which he was now about to give Evidence) before such time as he had retained him, the Court were of Opinion, that he might be sworn. Otherwise Postea, the if he had been retained his Solicitor before: The same Law of an next Case. Attorney or Counsel.

*Sir Samuel Jones versus the Countess of Manchester.*

**I**N an Ejectment upon a Trial at the Bar, the Evidences which (as the Plaintiff pretended) would have made out his Title, and would have avoided the Settlement in Jointure, which the Countess of Manchester claimed, were locked up in a Box, which was in the Custody of a Stranger, who before the Trial delivered the Key to the Earl of Bedford, Brother to the Countess of Manchester, and Trustee for her; who being present in Court, and requested to deliver the Key, that the Box might be opened, which was brought into Court: He said, Being a Trustee in the behalf of his Sister, he conceived, he was not obliged to shew forth any Writings that might impeach her Estate; and if he should, it would be a Breach of the Trust reposed in him, which he held sacred and inviolable.

The Court told him, That they could not compel him to deliver the Key: But Hale said, It were more advisable for him to do it. Ante, the next Case to this. For he held, tho' it is against the Duty of a Counsellor or Solicitor, &c. to discover the Evidence, which he who retains him, acquaints him with; yet a Trustee may and ought to produce Writings, &c. But they could not rule him to do it here; and the Earl declaring his Resolution not to do it, the Plaintiff's Counsel desired leave of the Court to break open the Box.

The



The Court said, That they would make no Order in it, nor would determine how far the Title to the Writings drew in the Property of the Bor; or whether the delivering the Key to the E. did not amount to a Pledge of the Bor?

Serjeant Maynard said, It was the course of the Chancery, when a Bill was exhibited against a Jointress, to discover Writings, not to compel her to do it till such time as the Plaintiff agrees to confirm her Jointure. And he knew a Bill of Discovery brought against a Purchaser upon a valuable Consideration; and the Court would not compel him to answer, tho' it was proved there was a Deed and a real Settlement.

Upon opening the Evidence in the Case at Bar, these Points were stirred and resolved by the Court.

1 Sid. 343,  
344.  
1 Mod. 40.

That where a Man makes a Feoffment, &c. to Uses, with Power of Revocation, when he hath executed that Power, he cannot limit new Uses but if it had been with a Power to revoke and limit new, then he might revoke and limit new, with a Power of Revocation annexed to those new; which if he doth afterwards revoke, he may again limit new Uses according to the first Power, and so in infinitum: But always the new Uses must correspond to those Circumstances, &c. which the first Power appoints, for that is the Foundation. 2 Roll. 262. Becker's Case.

The Plaintiff being at a loss for his Writings, was nonsuit.

*Seaman versus Dee.*

2 Keb. 860,  
879.  
2 Keb. 39.  
3 Keb. 15.

**A**N Indebitat' Assumpsit, as Executor of S. was brought against the Defendant by the Plaintiff, as an Attorney of this Court, by Original.

The Defendant pleads four Judgments against him; one in an Action of Debt, (upon which the Question was) for Money borrowed by the Testator upon Interest, which Debt with the Interest, at the time of the Action brought, amounted to such a Sum, which was recovered against him: And pleads three Judgments besides, ultra quæ he had not to satisfy.

The Plaintiff demurs, and after being divers times spoken to, the Court resolved for the Plaintiff.

First for that as Ha'e said, No Action of Debt lies for the Interest of Money, tho' he which borrows it promises to pay after the rate of 6 l. per Cent. for it; but it is to be recovered by Assumpsit in Damages. So where by Deed the Party covenants or binds himself to pay the Principal with Interest, the Interest is not to be included with the Principal in an Action of Debt, but shall be turned into Damages, which the Jury is to measure to what the Interest amounts to, which is allowed to be done; tho' indeed the Statutes (which permit the taking of Interest) say,

That

That Usury is damned, and forbidden by the Law of God. And <sup>Vaugh. 93;</sup> tho' it was objected, That the Judgment is but erroneous, and the <sup>94, 95.</sup> Executor liable while reversed; and it cannot be said, it was the <sup>2 Saund. 49.</sup> Executor's fault to suffer it: For an Executor may plead a Judgment against him in Debt upon a simple Contract; tho' it could not have been recovered if he had pleaded to the Action, or without his voluntary Consent;

To that Hale said, That Debt upon a Simple Contract lies against an Executor, if he please; nay, it hath been adjudged, that an Executor may retain for a Debt due to him from the Testator, <sup>2 Vent. 40.</sup> upon a simple Contract: But in this Case no Action lies by the Law, nor any admission of the Executor can make it good.

Secondly, It appears, That part of the Interest accrued after the Testator's Death, which is the Executor's proper Debt, being his own default to suffer the Interest to run on: Then the Action being brought, both for that which is due in the Testator's time, and for that which grew due since, is manifestly erroneous; and there is nothing in the Defendant's Plea to take away the Intendment, that he had Assets to satisfy at the Testator's Death.

To the Objection, That the Plaintiff had abated his Writ; for that he declares by Privilege as an Attorney of the Court,

It was answered, That the alledging of his Possession and Privilege in the Declaration, was Surplusage and an impertinent flourish, and that being rejected, the Declaration is sufficient upon the Writ; and an Attorney is at election to sue, either by Original, or by Privilege. Wherefore the Rule was, That the Plaintiff should have his Judgment.

#### The Lady Anne Fry's Case.

**I**n an Ejectment by Williams, Lessee of George Porter Esquire, <sup>Raym. 236.</sup> against the Lady Anne Fry. The Case appeared to be this, upon a Special Verdict. <sup>1 Mod. 86, 300.</sup>

That Mountjoy, Earl of Newport, was seised of a House called Newport-house, in the County of Middlesex, and had three <sup>2 Keb. 756, 787.</sup> Sons, who are yet living, and had two Daughters. Isabel married to the Earl of Banbury, by whom she had Issue Anne the <sup>2 Lev. 21.</sup> Defendant; and Anne married to Porter, by whom she had Issue <sup>3 Keb. 19.</sup> George Porter Lessor of the Plaintiff, and made his Will in this <sup>Caf. Canc. 138.</sup> manner: <sup>2 Rep. Canc. 26.</sup>

I give and bequeath to my dear Wife, the Lady Anne, Countess of Newport, all that my House called Newport-house, and all other my Lands, &c. in the County of Middlesex, for her Life; and after her Death I give and bequeath the Premises to my Grand-child  
Anne



Anne Knolles (viz. the Defendant) and the Heirs of her Body: Provided always, and upon Condition, That she marries with the Consent of my said Wife, and the Earl of Warwick, and the Earl of Manchester, or the major part of them: And in case she marries without such Consent, or happen to die without Issue, then I give and bequeath it to George Porter. (viz. the Lessor of the Plaintiff.)

The Earl of Newport dies, and the Lady Anne Knolles being of the Age of 14 Years, marries with Fry without the Consent of her Grandmother, or either of the Earls; and it was found, that he had no Notice of the Will until after the Marriage, and that George Porter at that time was of the Age of 8 Years; and that after the Death of the Countess she entred, and George Porter entred upon her, and made the Lease to the Plaintiff.

This Case having being twice argued at the Bar, (viz.) in Michaelmas Term by Sir William Jones for the Plaintiff, and Winnington for the Defendant: And in Hillary Term last by Finch, Attorney General, for the Plaintiff, and Sir Francis North, Solicitor General, for the Defendant;

It was this Term resolved by the Court, (viz.) Hale, Twissden and Rainsford, (Moreton being absent) for the Plaintiff, upon these Reasons.

Rainsford. Here have been three Questions made.

First, Whether the words in the Will, whereby the Marriage of the Defendant is restrained, make a Condition or Limitation? If a Condition, then none but the Heir can enter for the Breach. But 'tis clear, that they must be taken as a Limitation, to support the Intent of the Devisor, and to let in the Remainder which he limits over. 1 Roll. 411.

Secondly, Whether the Infancy of the Defendant shall excuse her in this Breach? And clearly it cannot: For a Condition in fact obliges Infants as much as others, (Vid. 8 Co. 42. Whittingham's Case, the difference between Conditions in fact and Conditions in Law,) especially in this Case, the nature of the Condition shewing it to be therefore imposed upon her, because she was an Infant.

3 Mod. 29,  
34.

Thirdly, (and the main Point of the Case,) Whether the want of Notice shall save the Forfeiture of the Estate? As to that, Let the Rules of Law concerning Notice be considered.

First, I take a difference where the Devisee, who is to perform the Condition, is Heir at Law; and where a Stranger. The Heir must have Notice, because he having a Title by Descent, need not take notice of any Will, unless it be signified to him. And so is Fraunce's Case, 8 Co. where the Heir was Devisee for 60 Years, upon Condition not to disturb the Executor in removing the Goods:

Goods; and resolved that he should not lose his Estate upon a disturbance, before he had Notice of the Will. But where the Devisee is not Heir, (as in this Case) he must inform himself of the Estate devised to him, and upon what terms.

Another Rule is, When one of the Parties is more privy than the other, Notice must be given; but where the Privy is equal, Notice must be taken by the Party concerned. A Bargainee shall not enter for a Condition broken before Notice, for the Bargain and Sale lies in his Cognizance, and not the Lessee's, So if a Lease be made to commence after the end of the former, if the first be surrendered, the Lessor shall not enter for a Condition broken for Non-payment of Rent, until Notice given of the Surrender, 3 Leon. 95. And therefore there shall be no Lapse to the Ordinary upon a Resignation, without Notice. If a Man makes a Feoffment, upon Condition to enter upon Payment of such a Sum at a place certain, he must give Notice to the Feoffee when he will tender the Money, Co. Lit. 211. a. Dyer 354. And upon this Reason is Molineux's Case, 2 Cro. 144. where a Devise was, that his Heir should pay such Rents, and if he made default, then his Executors should have the Lands, paying the said Rents; and if they failed of Payment, then he devised the Land to his younger Children, to whom the Rents were to be paid. It was resolved, Non-payment by the Executors should be no Breach, until they had Notice that the Heir had failed, which was a thing that the younger Children must be privy to. But in 22 E. 4. 27, 28. Tenant for Life lets for Years, and dies; the Lessee must remove in convenient time, to be reckoned from the Death of the Tenant, whether he had Notice of it or not: For he in Reversion is presumed to be no more privy to it than himself. So Gymlere and Sands's Case, 3 Cro. 391. and 1 Roll. 856. where Baron and Feme were Tenants for Life, Remainder to the Son in Tail, Remainder to the right Heirs of the Baron; the Baron makes a Feoffment with Warranty and dies, then the Feme and Son join in a Feoffment; this is a Forfeiture of the Estate of F. tho' she had no Notice of the Feoffment or Warranty, whereby the Right of the Son was bound. So Spring and Caesar's Case, 1 Roll. 469. A. and B. join in a Fine, to the use of A. in Fee, if B. do not pay 10 l. to A. before Michaelmas: and if he doth, then to the use of A. for Life, Remainder to B. B. dies before Michaelmas, the Heir of B. is bound to pay the 10 l. without any Notice given by A. The Reason given (which comes home to our Case) is, For that none is bound to give Notice, and then it must be taken; tho' indeed a second be added, For that B. (from whom his Heir derives) had Notice. The Mayor and Commonalty of London against Alford, 1 Cro. where a Devise was to six Persons, to pay certain Sums for the Maintenance of an Almshouse, &c. and if through Obliviousness, or other

Cr. Car. 132.

1 Roll. 464.

N. 23.

2 Sid. 115,

116.

Hardress 42,

43.

Kell. 49. b.

Cr. Car. 575,

576, 577.

D d

Cause,



Cause, the Trusts were not performed, then to J. S. upon the same Condition; and if he failed by two Months, then to the Mayor and Commonalty of London upon the same Trusts. The six did not perform the Trusts, J. S. enters, J. N. enters upon him, and a fine with Proclamations was levied, and five Years passed; and the better Opinion was, That the Mayor and Commonalty of London were bound to pay the Money appointed by the Will, although they had no Notice that the six Persons or J. S. had failed; though indeed the Case is adjudged against them, as being barred by the fine and Non-claim. Sir Andrew Corbet's Case, 4 Co. is very strong to this purpose; where a Devise is to J. S. until he shall or may raise such a Sum out of the Profits of the Land: If a Stranger enters after the Death of the Devisor, tho' the Devisee had no Notice of the Will, yet the time shall run on, as much as if he had the Land in his own Possession.

These Rules being applied to the present Case, it will appear no Notice is to be given.

First, The Defendant is as privy to the Will as any one else, (viz.) as George Porter, who is found also to be an Infant. It is not found whether there were any Executors; if it had, they were not concerned to give Notice, nor did it import the Heir: For he could have neither Benefit or Loss by the Condition.

The two Cases which have been chiefly relied upon for the Defendant, were, first, France's Case, which differs, because it was in case of an Heir. Secondly, the Case of Saunders and Carwell, 8 Jac. in a private Report of Sir Geoffry Palmer, the Attorney General, in which there is no clear account of the Case, and we cannot find the Roll: It was a Devise to his Wife for Life, Remainder to the Daughter in Tail, upon Condition to pay Money; and it was held that the Non-payment would be no Breach unless she had Notice.

Palmer's R.  
164, 165.

First, It was an Opinion only upon Evidence, and Lea and Chamberlain only in Court.

Secondly, For ought appears the Daughter might be Heir, and then 'tis good Law.

Thirdly, It appears there was a foul Concealment of the Will for four Years time; within which time (for ought appears) the Condition was to have been performed.

Twisden was of the same Opinion; but I omit his Argument, because I could not hear him perfectly.

Hale was of the same Opinion. As to the first Point, I shall discharge the Case of it, as not fit to be called in question: For without peradventure though the Word Condition be used, yet limiting a Remainder over, makes it a Limitation; for so 'tis plain the Testator meant, and 'tis as much as if he had said, And if she marries, &c. then to remain, without the Word Condition.

And

And this hath received as many Resolutions as ever any Point did, (viz.) Wiseman and Baldwin's Case, 18 Eliz. 1 Roll. 412. Hainworth and Pretty's, 3 Cro. 833. and 2 Cro. Pell and Brown's Case, with a great many more; and nothing but the Opinion in Mary Porrington's Case, 10 Co. against it.

2 Leon. 51.  
Owen. 412.  
1 Leon. 383.

When Finch, Attorney-General, argued this Case, he observed that Coke himself was of another Opinion in the 3d Report, in Wellock and Hammond's Case, cited in Boraston's Case: For tho' there 'tis the Word Paying only, which is adjudged a Limitation; yet Coke saith, The Quære in Dyer 317. is upon that well resolved, and the Case in Dyer is upon the Word Condition expressly.

Then to proceed to the other Matters. Here is an Estate Tail devised to the Defendant, subject to Limitations, the one of Law, (viz.) dying without Issue; the other express and in Fact, (viz.) marrying without the Consent, &c. and both are coupled together; so that whenever she marries without Consent, &c. her Estate determines and is transferred to him in Remainder, without either Entry or Claim. 'Tis all one as if the Estate had been devised to her for Life, and if she marries, then to remain, which had been but an Estate quamdiu sola vixerit: And it is to be observed, that if her Marriage here be no Breach of the conditional Limitation (for so 'tis properly called) because she had no Notice, then it can never be broken: So that the Question must be, Whether such a Marriage shall discharge the Estate of it, and make it become absolute?

'Tis true, Where the Condition requires such an Act to be done, as may be done after Notice, it hath been questioned, Whether the Law shall not protract the time limited for Performance, until Notice be had, 1 Cro. Alford's Case, which was a Condition for Payment of Money: But this is a thing of that nature, that being done, no subsequent Notice can ever retrieve.

Cr. Car. 575.

Then 'tis to enquire, how far the Want of Notice will excuse: It must be considered, That 'tis a Will made by a Person now dead, who can give no Notice, neither can any come to the Knowledge of it without Enquiry, and one hath the same means to obtain it with another; and the Person who would take Advantage of it, must make the best Enquiry he can. If a Devise were made to the Defendant, it was her Concern to enquire upon what terms; until then how can it be ascertain'd whether she will take it? And so it was Porter's Business to enquire; no difference between them in this respect. So that upon these five Accounts, it will appear, that no Notice is requisite to be given in this Case.



First, Because the Testator hath not appointed any Notice to be given, for he which was the Disposer might give upon what terms he pleased; and this Matter of Notice shall not be added unless it were in a Case wherein the Law would very strongly require it.

Secondly, Because there is no Person who can reasonably be engaged to give Notice, (viz.) not the Heir, for he is disinherited; not the Executors, for they are not concerned in the Freehold; nor the Trustees, for they have but their labour for their pains; nor Porter, for he is no more bound to give than he to take Notice.

Thirdly, Because each Party have the same means of Informing themselves of the Will, (i. e.) by Enquiry.

Yelv. 103.

Fourthly, It more imported the Defendant to know it, as relating to her own Interest; the Will which gives the Estate, gives it upon this Conditional Limitation. Corber's Case, 4 Co. comes very close; where, if the Devisee stays while the time wherein the Honey might be raised is elapsed, he shall never raise it after. Suppose a Man dies possessed of a Term upon which a great Rent is reserved; shall the Executor, after that he hath proved the Will, throw up the Term, as pretending not to have known of it? An Estate is devised to one durante Viduitate; shall she marry, and because she had no Notice of the Will hold the Estate absolutely for her Life? There is the same Reason in this Case; for this Proviso is a part of the Limitation of the Estate it self. No Man is presumed to be ignorant of his own Interest; and as he must take Notice to acquire, so also of the manner of the Estate he gains. But he that gave it thus, was not obliged to do so much.

1 Sid. 36.

Fifthly, It was not impossible for the Defendant to have made Enquiry, and she must not take advantage of her Laches. A Bond with Condition to pay 50 l. when the Obligee shall marry the Obligor's Kinswoman; in Debt upon this, it was resolved, That the Obligee was not bound to give Notice of the Marriage, though it lay in his own Privacy; because the Obligor might have known it by other means, Hill. 1650. Between Try and .... Rot. 1081. B. R. It was proper for the Defendant to have enquired, whether her Grandfather gave her any thing: And so it was for him that should marry her. Harwood's Case adjudged here (Hill. ult.) was upon this Reason: He married a City Orphan in Kent, and was fined by the Court of Orphans, because he had not first applied himself to them for their Licence, &c. according to the Custom of the City: And the Fine was resolved here to be well imposed, though he had no Notice that she whom he married was an Orphan; because it was his business to enquire of the Condition of her whom he will make his Wife.

Ante 36,  
78, 178.

1 Roll. 463.  
2 Cro. 182,  
228.

The next thing to be considered is the Infancy of the Defendant, and that is nothing in this Case. Porter who was the probablest person to give Notice is found to be an Infant too. Conditions in fact bind Infants. Again, the Condition here relates to an Act, which she is capable of doing. The Statute of Merton, which enacts, Non currant usurae, &c. whereby Infants are exempted from Penalties; yet in another Chapter gives the Forfeiture of the said double value to the Lord where his Ward marries without his Consent. 'Tis a Restraint laid upon her in a matter proper for her Condition, and with respect to her Condition, that being an Infant, she might advise with her Friends about her Marriage. The Cases which have been objected do not come to this Case, as the Opinion in Saunders and Carwell's Case, which might be good Law, if it could be known what that Case was, for the Words might either explicitly or implicitly require Notice, as if they were, if he refused to pay, &c. or it may be no time might be set for Payment; for in Molineux's Case, there Rents were granted, and after a Devise for the Payment of them which naturally lie in Demand. Palm. 164, 165.

Secondly, There it concerned the younger Children to give Notice; for the Rents were not only to be paid to them, but upon failure of Payment the Land was devised to them; so that was a Concurrence of concern in them, as to the performance of the Condition, and the Estate they should acquire by the Breach. Whereas the Plaintiff in this Case is not concerned in the performance of the Condition.

Thirdly, The Penning of the Condition there quite differs; for 'tis upon default of Payment, which implies Notice must be first had. In France's Case, there would have been no need of Notice, if the Devise had not been to the Heir, which is the only thing wherein it differs materially from this Case. In Alford's Case, the Debate was occasioned by the special Penning; for it was thus, that if through Obliviousness, the Trusts should not happen to be performed. Now there could be no Oblivion of that they never knew; therefore there is some Opinion there, that the Mayor and Citizens of L. ought to have had a precedent Notice; yet the Judgment is contrary, for they could not have been barred by the Fine and Non-claim if Notice had been necessary to the Commencement of their Title; and 'tis not found, Whether those to whom the Estate was devised before, had Notice; so that this cause proves rather, that there needs no Notice in this Case, than otherwise. Wherefore the Plaintiff must have his Judgment. 3 Mod. 29, 34. Cr. Car. 575.

When my Lord Chief Justice had concluded, Rainsford said, he had spoken with Justice Moreton, who declar'd to him, that he was of the same Opinion.



Fitzgerald *versus* Marshall.

3 Keb. 44.  
1 Mod. 90.  
2 Keb. 875.

**E**rror of a Judgment given in the King's Bench in Ireland, in Affirmance of a Judgment removed thither by Error out of the Common Pleas in Ireland.

By the Record it appeared, That the Writ of Error to the Common Bench was directed Rob. Booth, Militi & Sociis suis, quia in Recordo & processu ac in redditione Judicii loquelæ quæ fuit coram vobis & Sociis vestris. And the Judgment, certified, appeared to be in an Action commenced in the time of Sir R. Smith who died, and Sir R. Booth made Chief Justice in his place before Judgment given. And the Court here were of Opinion, That the Record was not well removed into the King's Bench here, by that Writ, which commanded them to remove Recordum loquelæ coram R. Booth: whereas the loquela commenced before R. Smith, and the Titling of the Record is in such case placita coram R. Smith, &c. though some of the Continuances might be entered coram R. Booth, and the Judgment given in his time: And for this Cause, the Judgment given in Affirmance in the King's Bench there was reversed.

Sir Samuel Sterling *versus* Turner.

2 Ven. 25.  
the Report of  
this Case upon  
the Action in the  
Common  
Pleas.  
3 Keb. 26.  
32.  
2 Lev. 50.

**E**rror of a Judgment in the Common Bench, in an Action upon the Case, where the Plaintiff declared upon the Custom of London, of electing of two Men into the Office of Bridge-masters every Year by the Citizens assembled in a Common Hall; and a Custom that if two be Competitors, he that is chosen by the greatest number of Votes is duely elected; and that if one in such case desire the Poll to be numbered, the Mayor ought to grant the Poll. And shews that there was a Common Hall assembled, the 18 of October 22 Regis nunc, Sterling being Mayor, and that then the Plaintiff and one Aker stood as Competitors to be chosen to that Office, and avers that he had the greatest number of Voices, and that he affirmed then and there, that he had the greatest number; which the other denying, he requested the Mayor, that according to the Custom they might go to the Poll; and the Defendant not minding the Execution of his Office, but violating the Law and Custom of the City, then and there did maliciously refuse the numbering of the Poll, but immediately made Proclamation, and dismissed the Court, by which he lost the Fees and Profits of the Place, which he averred belonged unto it.

Upon Not guilty pleaded, and Verdict for the Plaintiff, after it had been several times argued in Arrest of Judgment, That this Action did not lie, it was adjudged for the Plaintiff, by Tyrrel, Archer and Wylde, Vaughan dissenting. And now Error was brought

and

and assigned in the matter of Law, and argued for that it was uncertain, whether the Plaintiff should have been elected; and that he could not bring an Action for a Possibility of Damage, and this was no more, not being decided who had the greatest number of Voices.

But the Court were clear of Opinion, That the Judgment should be affirmed; for the Defendant deprived the Plaintiff of the means, whereby it should appear, whether he had the greatest number of Electors or no. And Hale said, It was a very good Precedent, and so it was adjudged by both Courts.

One D of Bedfordshire, Esquire, was indicted of High Treason, <sup>3 Keb. 30.</sup> for coining a great number of counterfeit pieces of Guineas of Gold, <sup>23 Regis nunc,</sup> and being arraigned at the Bar, he pleaded the King's Pardon; which was of all Treasons, and of this in particular, but did not mention that he stood indicted.

Twisden said, That my Lord Kelynge was of Opinion, That such a Pardon was not good. But Hale said, It might be well enough in this Case, but in case of Murther it is necessary to recite it, because of the Statute of 27 E. 3. 2. (vid. 10 E. 3. 2. 14 E. 3. 15.) and so it was allowed.

#### The Lady Chester's Case.

**A** Prohibition was prayed to the Prerogative Court of Canter- <sup>3 Keb. 30.</sup> bury. Sir Henry Wood having devised the Guardianship of his Daughter by his Will in Writing, according to the Act of this <sup>St. 12. Ca. 2.</sup> King, to the Lady Chester his Sister; the Dutchess of Cleveland, <sup>cap. 24.</sup> to whose Son this Daughter, being about 8 Years old, was contracted, pretending that Sir Henry Wood by Word revoked this Disposition of the Guardianship, sued in the Prerogative Court, to have this nuncupative Codicil proved; and the Court granted a Prohibition, for they are not to prove a Will concerning the Guardianship of a Child, which is a thing consutable here, and to be judged whether it be devised pursuant to the Statute. And Hale said, <sup>1 Mod. Rep.</sup> That they may prove a Will which contains Goods and Lands, <sup>90.</sup> tho' formerly a Prohibition used to go quoad the Lands. Vid. <sup>2 Sid. 143.</sup> 1 Cro. <sup>Hard. 131.</sup> Netter and Percivall's Case.

#### Prior *versus* . . . .

**E**rror was brought of a Judgment in this Court into the Exche. <sup>2 Lev. 38.</sup> quer-Chamber, and Error in Fact was then assigned; and the <sup>3 Keb. 28.</sup> Court being there of Opinion, That Error in Fact could not be assigned there, they affirmed the Judgment; upon which the Record with the Affirmation was remitted hither, and a Writ of Error was brought



<sup>2</sup> Cro. 620. brought here, coram vobis resident. (as is usual for Error in Fact.)  
<sup>1</sup> Lev. 49. It was prayed, that upon putting in of Bail, this new Writ of Error might be a Superedeas to the Execution. But the Court held, That this Writ was not to be allowed in this Case, for the Judgment given in this Court, being affirmed in the Exchequer-Chamber, transit in rem judicatam there, and a Writ of Error cannot be brought here upon a Judgment there; and 'tis always the course in Writs of Error to recite all the Proceedings that have been in the matter; as if a Judgment be removed hither, by Error out of the Common Pleas, and here affirmed and then brought into Parliament, the last Writ must recite both the Judgment in Communi Banco, and the Affirmation here. And whereas this Writ goes by the Judgment into the Exchequer-Chamber, and mentions only the Judgment here, it must therefore be quashed: And it is the course, if a Writ of Error be brought here upon Error in Fact of a Judgment here, that the Writ should be allowed in Court. And the Court said, they would allow none in this Case.

## Thrower's Case.

3 Keb. 28.

**H**E was indicted at the Sessions of the Peace at Ipswich for stopping communem viam pedestrem ad Ecclesiam de Witby. It was removed hither by Certiorari, and the Court were moved to quash it, for it was objected, That an Indictment would not lie for a Nuisance in a Church path; but Suit might be in the Ecclesiastical Court. Besides the Damage is private, and concerns only the Parishioners. Where there is a foot-way to a Common, every Commoner may bring his Action if it be stopped, but in such case there can be no Indictment.

Hale said, If this were alledged to be communis via pedestris ad Ecclesiam pro parochianis, the Indictment would not be good, for then the Nuisance would extend no further than the Parishioners, for which they have their particular Suits; but for ought appears this is a common foot-way, and the Church is only the Terminus ad quem, and it may lead further; the Church being expressed only to ascertain it, and 'tis said ad commune nocumentum; wherefore the Rule was, that he should plead to it.

## The Lady Prettyman's Case.

2 Keb. 13, 27.

**A** Judgment was had in a Scire facias brought against her upon a former Judgment, upon two Nihils returned. And the Court was moved to set it aside, for that it was alledged, That before the Scire facias brought, she was married to Sir John Prettyman, and that it was brought against her as sole, by Contrivance between the Plaintiff and her husband to oppress her, and lay her

up in Prison; and it was shewn that the Plaintiff knew of the Marriage, for he (being an Attorney) had prosecuted another Action before the Return of the Scire facias against her and her Husband, and that she could not help her self by Error, or Audita Querela, because her Husband would release.

The Court said, They might set aside the Judgment for the Misdemeanour of the Plaintiff: but because they were informed, that this Marriage was under Debate in the Ecclesiastical Court, and near to Sentence, they suspended making any Rule in this, while that was determined.

Twisden said, He had a Case from my Lord Kelynge, where a feme Covert Infant levied a Fine, and her Friends got a Writ of Error in her Husband's and her Name, that the Court would not suffer the Husband to release. But Hale said, He could not see how that could be avoided; but he had known, that in such case the Court would not permit the Husband to disavow the Guardian, which they admitted for the Wife.

#### How's Case.

**H**E was indicted of an Assault, Battery and Wounding of Thomas Masters Esquire, and found Guilty at the Assizes in Gloucestershire. Now the Attorney General moved the Court to set a Fine, and such an one as might be exemplary, according to the demerit of the Fact; for he shewed, That a great part of the Sentry of Gloucester, amongst which were How and Masters, being assembled at Cirencester, about the Election of a Burgess for that Town; How without any Provocation, struck Masters on the Cheek with the end of his Cane, which had an Iron Pike at it; and that if Masters had not governed himself with much Moderation and Prudence, it had in all probability engaged the whole Assembly in a dangerous Quarrel, they being both Men of great Estates and Quality in the Country. And the Attorney said, There was nothing more necessary than that somewhat of a limited Star-Chamber should be exercised in this Court, for the due Punishment of such enormous Crimes as these.

Hale said, That they were much discouraged from setting Fines, for the new Act binds them to extreat them into the Exchequer; and then it was well known whither they went, (meaning to such as farmed them from the King by Patent.) The Attorney replied, That the Legality of such Patents was to be questioned; and that one which was granted to the Earl of Berkshire, was now like to be resumed, and it was fit it should, seeing it was like to prove an Obstruction to the publick Justice.

7 Co. Penal  
Statutes.



Then it was doubted, Whether the Fine could be set, How not being present? But held it might, but the Court is not to hear any thing moved in Mitigation of the Fine, unless the Party be present, and he was fined 500 Marks.

Ward *versus* Forth.

3 Keb. 26, 30. **I**N Debt upon a Bond, the Defendant pleads, That he delivered the Deed as an Escrow to J. S. &c. & hoc paratus est verificare.

To this it was demurred; For that he ought to have concluded, & illic nient son fait, for this matter amounts to a Special Non est factum, and the Plaintiff cannot reply, That he delivered it as his Deed, absque hoc that he delivered it as an Escrow, and so said the Court.

Sherman's Case.

2 Keb. 23.

**B**y Certiorari, an Order for the keeping of a Bastard Child by the Justices of the Peace, in pursuance of the Statute of 18 Eliz. was removed into this Court, which was excepted to.

First, For that they had appointed the Father to allow 4s. to the Midwife; whereas it did not appear, that the Parish had procured her, or that they were chargeable with it.

Secondly, For that they ordered 7 s. a Week, to be allowed for the Nursing-Cloaths, &c. of the Child, until it should be able to get its living by Working; which was said to be excessive in the Sum, and uncertain for the Time, for it should have been for so long time as it shall be chargeable to the Parish.

Hale said, That they could make no Allowance to the Midwife, unless in discharge of the Parish.

1 Mod. 20.

Twisden said, That they could not order the 7 s. a Week to be paid, until it should be able to get its Living, for perhaps the Father would take it away and maintain it himself, which he may do if he please; but that the Order might be quashed without more delay, and the matter remanded to farther Examination, Sherman consented to pay all the Arrears of the 7 s. a Week, and the Costs that had been expended in Maintenance of this Order, or what more should be laid out, in case he should be again found the reputed Father of the Child, for he said it was imposed upon him by Combination, whereupon it was quashed. Post 336.

## Sir Ralph Bovy's Case.

**A**N Action was brought upon an Escape, for that he being Sheriff of Surrey, voluntarily suffered J. S. whom he had in Execution, to escape. Postea 217.  
3 Keb. 55.

He pleads, That he made fresh Pursuit and took him again, and doth not traverse the voluntary Escape, to which it was demurred. Et adjournatur. Postea 217.

## Anonymus.

**A** Scire facias against the Conussee of a Statute, who had extorted, supposing that he was satisfied. He pleads, That before the Scire facias brought he had assigned over all his Interest, and prays Judgment of the Writ. 2 Keb. 27, 15.

Hale said, That the Writ was good, seeing he was a Party to the Record; the Plaintiff need not take Notice of the Assignee unless he please, and if there be part of the Debt unsatisfied, that is to be tendered to the Conussee.

In a Writ of Disceit, to reverse a fine of Land in ancient Demesne; after Assignment, the Conussee shall be made Party. So in a Writ of Error, tho' the Terre-tenant shall not be turned out of Possession without a Scire facias.

Dionise *versus* Curtis.

**T**Rover de duabus Centenis Plumbi uræ, Anglice, two hundred weight of Lead Ore.

It was objected, That Centena signifies an hundred in a County, 3 Keb. 14. and 'tis uncertain here of what it should be understood; but the Court said it was good with the Anglice, and to be understood by the subject matter. Trower de duobus ponderibus casei, Anglice, two weighs of Cheese, hath been held good. So de duobus oneribus Cupri, Anglice, two horse-loads of Copper.

## Evans, &amp;c.

**I**N an Action upon the Case, whereas he pretended Title to certain Goods in the Custody of one Susan Pricket, and claimed them to be his own, intending to remove them; the Defendant, in Consideration that he would suffer them to continue there, assumed to see them forth-coming, and that they should not be imbezilled, but safely kept to the use of the Plaintiff, and shews that afterwards the Goods were eloiigned, &c.



Upon Non Assumpſit and Verdict for the Plaintiff, it was moved to ſtay Judgment; That it doth not appear, that the Property of theſe Goods was in the Plaintiff, for it is alledged only, that he pretended to them, and claimed them to be his own: Sed non allocatur.

For the Declaration is full enough, at leaſt muſt be intended he proved they were his own, or the Jury would not have found for him.

Anonymus.

**I**N Debt upon a Record in an inferiour Court, upon Nil Tiel Record pleaded, they ſhall certiſie only tenorem Recordi, and grant Execution afterwards.

2 Lev. 231,  
236.

Hale ſaid, That he had ſeen a Certiorari to certiſie tenorem Recordi, upon a Trial at Bar concerning the Toll of Uxbridge, the Town pretending to be incorporated, and to have a Right to the Toll: And it was reſolved, That no Burgh-holder could be a Citizenſhip for the Town.

## Termino Sanctæ Trinitatis, Anno 24 Car. II.

### In Banco Regis.

Mekins *verſus* Minshaw.

Postea 330.

3 Keb. 33, 51.

**A** Prohibition was prayed to the Court of the Chamberlain of Cheſter, where an Engliſh Bill was preferred, ſetting forth, That J. S. being indebted to the Plaintiff, the Defendant upon good Conſideration promiſed, That if J. S. did not pay it, he would; and that he wanted ſuch precise Proof of the Promiſe as the Law required. Wherefore he prayed to be relieved by the Equity of the Court.

The Defendant confeſſed the Promiſe in his Anſwer, and alledged further, That he had paid the Money. And a Prohibition was granted; for the Plaintiff had now obtained the end of his Suit, and might have remedy at Law upon the Evidence of the Defendant's Anſwer,

Anonymus.

**A**N Action was brought for these Words: The Defendant said <sup>2 Lev. 51.</sup> of the Plaintiff, That he had picked his Pocket against his <sup>3 Keb. 34,</sup> Will; and at the same time *de ulteriori malicia* said, He was a Pick-Pocket.

The Defendant justified, but in such manner as it was ruled against him.

Then he moved to stay Judgment upon the Insufficiency of the Declaration: And the Court were of Opinion that the Words were not actionable, as carrying with them no necessary Implication of Felony, and might mean only Trespasses. And Hale said, he would not improprie Actions for Words further than they are.

*Fortescue versus Holt.*

**A** Scire facias was brought upon a Judgment of 1000 l. as <sup>3 Keb. 40.</sup> Administrator of J. S.

The Defendant pleaded, That before the Administration committed to the Plaintiff, (*viz.*) such a Day, &c. Administration was granted to J. N. who is still alive at D. And demanded Judgment of the Writ.

The Plaintiff replies, J. N. died, &c. & *de hoc ponit se super Patriam*. And to that the Defendant demurs;

For that he ought to have traversed *absque hoc*, that he was alive: For tho' the Matter contradicts, yet an apt Issue is not formed without an Affirmative and a Negative; and so said the Court. And also that the Defendant's Plea was bad, being concluded in Abatement; whereas it goes in Bar, which was so palpable, as made it evident to be used only for delay. Which Hale observing, he did exceedingly blame the bad Practice that is amongst Counsel in advising such Pleas, and said it was within the Penalty of Westm. 1. Serjeants, Compters, &c. and said, Tho' Counsel were obliged to be faithful to their Clients; yet not to manage their Causes in such a manner, as Justice should be delayed, or Truth suppressed; to promote which was as much the Duty of their Calling, as it was the Office of the Judges; tho' not in so eminent a Degree.

In this Case it was doubted, Whether Judgment final should be given, or a *Respondeas Ouster*: But because the Plaintiff said, he would be content with the latter, that was not resolved.

Anonymus.



Anonymus.

**I**N Trespas Quare clausum fregit, 'tis a Plea in Abatement to say, That the Plaintiff is Tenant in Common with another : But cannot be given in Evidence upon Not guilty, as it may where one Tenant in Common brings Trespas against the other.

Peters *versus* Opie.

Ante 177.

**T**he Case was moved again, and Hale held clearly, That the Promise being pro labore (tho' there was also a Counter-Promise) did carry in it a Condition precedent, (viz.) That the work should be done first. And he said, That in Cases tried before him, where the Declaration was upon Reciprocal Promises, if it appeared upon the Evidence, that the Intention was, That the Plaintiff's Part was to be performed before the Defendant's, he directed against the Plaintiff, and would not have the Defendant driven to his cross Action.

Twisden strongly to the contrary. Pro labore (says he) is no more than would have been implied if those Words had been omitted; then 'tis within the Case of Reciprocal Promises. The Case cited in Ughtred's Case, 7 Co. A covenants to B. to serve him in the Wars, B. covenants to pay him so much for it; an Action lies for the Money without Averment of the Service done, because of the mutual Remedy.

Hale was now of Opinion, That the Plaintiff's saying, parat fuit & obtulit to do the Work; tho' he did not say, and the other refused, yet it was a sufficient Averment after a Verdict. The Case of Vivian and Shipping, 4 Cro 384. in an Assumpsit upon a Promise to perform an Award, the Plaintiff said licet he had performed all on his part, &c. which tho' no good Averment in Form, yet held it aided by the Verdict.

Wherefore tho' they could not agree in the other matter, yet Judgment was given for the Plaintiff. Ante 177.

King *versus* Melling.

2 Lev. 58.

Apres. 229.

3 Keb. 42, 52,

95.

Postea 225.

Lev. Ent. 98.

**I**N an Ejectment, the Case was thus found in a Special Verdict.

John Melling was seised in Fee, and had Issue Bernard and John, and by his Will in Writing devised to Bernard for and during his Natural Life, and after his decease to such Issue as he should have of the Body of his second Wife, (his first then being alive;) and if no such Issue happen'd, then to John Melling; provided that Bernard might make a Jointure to his Wife, which

she should enjoy for her Life. The Devisor dies, Bernard suffers a Recovery to the use of himself in Fee, and after covenanted to stand seised to the use of his Wife for her Jointure for Life, and died without Issue by any second Wife. The Question was, Whether the Wife had a good Estate, or that J. Melling in Remainder had the Right?

It was argued for John Melling; First, That Bernard Melling had only an Estate for Life by this Devise. Indeed if it had been to him and his Issue which he should have by the second Wife, that would have been an Entail; but here 'tis expressly given to him for his Life. The Case of Wiat Wield, 8 Co. 78. b. is full to this: A Devise to a Man and his Children is an Estate Tail, if he hath none at the time: But if the Devise were to a Man for his Life, and after his Decease to his Children; there, whether he had Children or no at the time, they take by way of Remainder, either contingent or vested. So Archer's Case, 1 Co. 1 Roll. 837. A Devise to his Son for Life, the Remainder to the Sons of his Body lawfully begotten; the Son takes only an Estate for Life, because so expressly limited. Then the Recovery destroys this contingent Remainder, and so also the Power of appointing a Jointure to his Wife: For 'tis not a bare Collateral Power, but annexed to his Estate, and therefore extinguishes in the Conveyance of it.

Wild's Case,  
6 Co. 16. b.

But admitting it were still in him, yet he did not well execute it, which should have been in such manner as it might have taken Effect by the Will, and not to arise upon a Covenant to stand seised.

On the other side it was argued, That it was an Estate Tail in Bernard Melling, and no Remainder contingent to the Issue: For there a Remainder is said to be contingent where the first Estate may fail before 'tis ascertain'd whether the Contingency will happen or no: Here if it be an Entail, Bernard Melling hath it for his Life, and the Issue had nothing until after his decease. So 'tis but an *Expressio eorum quæ tacite insunt*.

Again, The Power remains notwithstanding the Recovery; for 'tis collateral to the Estate. If Executors have Authority to make a Feoffment for the Payment of the Testator's Debts, if they should first make a Feoffment to another Purpose, this would not determine their Power, but they might afterwards execute it in performance of the Will. 1 Co. in Albany's Case.

Hale. It seems very strong upon Wield's Case, That Bernard Melling hath but an Estate for Life; if it were devised to him, and after his Decease to his Issue, I would think that to be an Estate Tail; but here the express Words are for his Life. A Devise to one for his Life, and after his Decease to his Heir, that hath been held a Fee; for Heir is nomen Collectivum. But Archer's Case,

1 Co.



1 Co. is a Devise to A. for his Life, and after to his Heir, and the Heirs of that Heir; there because the Words of Limitation were put to the Heir, therefore Heirs were taken to be but designatio personæ, and resolved he should take by Purchase. Vide Anderson 110. Construction must be according to the express Words of the Will. A Devise to two equally to be divided between them, and to the Survivor of them, makes a Joint-tenancy upon the express import of the last Words.

Twisden. A Devise to one for Life in Perpetuity, makes but an Estate for Life only, 15 H. 8

Hale. 'Tis considerable also, that he adds a Power to make a Jointure, which would have been useless if he had intended him an Estate Tail: And this Power is in the nature of an Emolument annexed to his Estate, which seems to be destroyed by the Recovery, neither hath he well executed his Power; for after the Recovery he became seised in Fee, so the Covenant to stand seised may work upon that Estate, and so shall not be taken in pursuance of his Authority, which possibly it might have been if he had but an Estate for Life; for without Reference to that, it would have been ineffectual; & quando non valet quod ago, ut ago, valeat quantum valere potest. And this is agreeable to the Learning in Sir Edward Clerke's Case in the 6 Co.

The Court seemed pretty clear in these Points; but because it was upon the first Argument, they gave leave to the Parties to speak to it again, if they thought fit. Et adjournatur. Post. 225.

#### Goffe's Case.

A Trial at Bar was had upon an Indictment of Murder. The Case appeared to be this:

Goffe (being a Collector of the King's Duty of Chimney-Money) came with a Constable to the House of one West in Southwark, to demand Money due upon that account, and entred the House, there being only a Maid-Servant at home; who telling them, That her Master was from home, and that she could not tell where to find him, or come at any Money to pay them, they presently distrained a Silver Cup which stood by. The Maid thinking to prevent the carrying of it away, stands against the Door where they were to have gone out, and Goffe took her by the Arm and beat her head and Back against the Door-Post divers times, of which she died within three Weeks after.

The Court was of Opinion, That this was but Homicide, and directed the Jury to find it so; for hindering their Passage out, to go away with the Distress, was a Provocation. And 'twas found accordingly.

## Meredith's Case.

**E**rror of a Judgment given in the King's Bench in Ireland, where Robert Meredith was Plaintiff, and that Judgment was entered, Quod prædict' Carolus Meredith recuperet.

And the Court held it amendable, as the Default of the Clerk, tho' in the Judgment; the Misprision being only in the Name, which was right in the rest of the Record that was before the Clerk, and should have directed him.

## Sir Ralph Bovy's Case.

**I**n Debt upon an Escape, the Plaintiff sets forth in his Declaration a voluntary Escape. Ante 211.  
3 Keb. 55.

The Defendant protesting that he did not let him voluntarily escape, pleads, That he took him upon fresh Pursuit. To which it was demurred, Because he did not traverse the voluntary Escape; and resolved for the Defendant: For it is impertinent for the Plaintiff to alledge it, and no ways necessary to his Action. 'Tis out of time to set it forth in the Declaration; but it should have come in the Replication. 'Tis like Leaping (as Hale Ch. Justice said) before one come to the stile: As if in Debt upon a Bond the Plaintiff should declare, That at the time of Sealing and Delivery of the Bond the Defendant was of full Age; and the Defendant should plead deins age, without traversing the Plaintiff's Allegation. Whiting and Sir. G. Reynell's Case 657. in the 2 Cro. seems to be against it: But Harvey and Sir G. Reynell's 2 Car. in Latch, is resolved, That no Traverse is to be taken. Ante 211.

Thomas *versus* Butler.

**A** Prohibition was prayed to the Ecclesiastical Court, where the Case was this: 3 Keb. 23, 27.  
&c.  
2 Lev. 55.

Sir R. Ashton made his Will, and therein gave divers Legacies, and the residue of his Goods and Chattels (after his Debts and Legacies paid) he bequeathed to his Wife, and made three Executors and died, whereof one only proved the Will, and afterwards died Intestate.

V. Finch.  
171.

The Daughter of Sir R. Ashton procures Letters of Administration (the Wife intailed) and above five years after the Lady Butler, the Relid of Sir R. Ashton, and residuary Legatee, sues to have them repealed: And whether there should be any Prohibition to that Suit, the Court thought fit to advise. For it was suggested, That there was not Assets to pay the Debts and Legacies, and so there could be no Residuum. And Sir Walter



Dy. 372. a.

Walker (a Doctor of the Civil Law) came to inform the Court what had been their Course in such cases; and he affirmed, That the Law was positive, absque aliqua distinctione, Assets or not Assets, That Administration should be committed to the residuary Legatee. And so Dr. Denny declared in Eastwick and Standen's Case in Dye. And in one Button's Case (which goes also by the Name of Cotton's Case) 17 Jac. this Point was much debated, where the next of Kin obtained Administration, the Residuum being devised to another, who afterwards got it repealed; and the first Administrator appealed to the Delegates, who confirmed the Repeal. Where the Residuum is devised, the Law judges those words tantamount to the making of him Executor, and it would be very inconvenient that an Allegation, That there is no Residuum, should be admitted; for that may be offered in every Case, and until that is tried Administration would not be granted, which might bring much Damage to the Estate of the Intestate. 'Tis also against a strong Presumption, (viz.) That every man leaves as much as will satisfy his Will. He said also, Seeing committing Administration was of the Cognizance of their Courts, he conceived they were to determine all Matters concerning them; and cited the Register, where 'tis said, *Cognitio principalis trahit ad se accessorium*.

2 Ven. 15, 22.  
Hob. 84.  
T. Jones 132.  
1 Sid. 181.  
Vaugh. 207.

Here Hale interrupted him, and said, Since the Statutes had made Provision in those cases, they were to expound them, and also to whom the Right of Administration appertained; and if the Ecclesiastical Court did not commit it accordingly, they use to prohibit them; and that the Court desired only to know from them, what their Usage had been. He also asked him, If it had been pleaded in their Court, That there was no Residuum, what they would have done?

To this he answered, That they should have received it as a Plea; but would have over-ruled it as insufficient: As was done in the Countess of Lincoln's Case, in 1655.

Dr. Masters contra. In this Case the Daughter was Legatee of an 100l. In the case of the next of Kin, one may be preferred before another; so why not one Legatee before another? Qui prior est tempore, potior est jure in aequali jure, they which first come, should be first served; and vigilantibus, non dormientibus jura subveniunt. For Button's Case he said, That there the Party to whom Administration was first granted, was no Legatee. So it was in the Countess of Lincoln's Case; neither was there a Sentence in that Case, but ended by Composition. In the Case between Blunt and Taylor, in 1670. where one Hall having made his Will, and made the Wife of Blunt Executrix, and devised to her the Residuum, she proved the Will and died. Blunt administers to her de bonis non of Hall; and the Grandchild of Hall (being next of

of Kin) cites Blunt to repeal his Administration; and obtained a Repeal, which was confirmed upon an Appeal to the Delegates. But Sir William Wylde denied the Case to be so; for he said, That the Administration was not repealed, as unduly granted at first; but for a male Administration: For Blunt being cited, denied either to pay the Legacy devised to the Grandchild, or bring in an Inventory, and the Case was debated upon that Point only before the Delegates; and he said, That it was their course to repeal an Administration tho' granted to the next of Kin, in case of Abuse.

But Hale said, That therein they exceeded their Power, and a Prohibition ought to go, and that they ought to take sufficient Caution at first to prevent male Administration. Cr. Car. 63.  
Raym. 93.  
1 Sid. 179.

The Court strongly inclined, That no Prohibition ought to go in this Case; for the Reason that 21 H. 8. requires that Administration should be granted to the next of Kin was, upon the Presumption, That the Intestate intended to prefer him: But now the Presumption is here taken away, the Residuum being disposed of to another; and to what purpose should the next of Kin have it, when no benefit can accrue to him by it? And 'tis reasonable that he should have the Management of the Estate, who is to have what remains of it after the Debts and Legacies paid. And the Averment, That there is no Residuum, is not material; for being once out of the Statute, upon Construction of the Words of the Will, there is nothing ex post facto can bring it within it. And there are certain Administrations which have been always ruled to be out of the Statute, as Administrations during Minority, and pendente lite, which need not be granted to the next of Kin, and granting it to the Husband comes not within the Words of the Statute. But because in this case Administration had been granted so long before the Residuary Legatee came in, and the Administrators by Decrees in Chancery had got in great part of the Estate, and still there were Suits depending there for obtaining of the rest, which were near their Effect; which would be abated and set aside if the Administration were now repealed, 1 Sid. 281.

The Court proposed an Accommodation, as most useful to either of the Parties and advantageous to the Estate; which was accepted.

The Civilians said, That a Legatee that had got Administration, tho' it were after repealed upon a Citation, should yet retain for his Legacy. Otherwise upon an Appeal; for there the Administration is avoided ab initio. Vid. Blackman's Case, 6 Co. Post 307, 316.



Bed niff & Ux' *versus* Pople & Ux.

3 Keb. 58.  
Ante 7, 61.  
Postea 343.  
1 Mod. 21.  
2 Lev. 63.

**A** Prohibition was prayed to stay a Suit for Defamation in the Ecclesiastical Court, for Words spoken to the Servant of the Plaintiff, (viz.) Go tell thy Mistress Whore, she is a Whore, and I will prove it. It was said, they were common Words of Bhabbling, and not importing any such Slander for which Suit could be there. 3 Cro. 393. Dimmock *versus* Fawcet, and 3 Cro. 456. Pewe and his Wife *versus* Jeffreys.

Hale. These cannot be said to be Words of Heat, as if spoken when the Parties are scolding together; but were uttered deliberately in the Party's absence to her Servant. Formerly they would prohibit, unless the Words implied some Act to have been done: Vid. Eaton *versus* Ayloff, 3 Cro. 110. But 'tis Reason the Suit should proceed in this Case, seeing it is for matter of Slander, which is punished by publick Penance. Therefore Suit lies in London for calling Whore; because by the Custom there, Whores are to be carted.

Wherefore the Court denied a Prohibition.

Read *versus* Wilmot.

**I**n False Imprisonment, the Defendant justified by a Capias, directed to him upon a Suit commenced against the Plaintiff in an Inferiour Court; to which the Plaintiff demurred; because it was not shewn that a Summons was issued first, and Inferiour Courts can award no Capias, but upon a Summons first returned. To which it was answered, That this being admitted, yet it is but an erroneous Process, in the Execution of which the Officer is excused, who is not to be punished when the Court proceeds in verso ordine.

Hale said, It was a great Abuse in those Courts, their ordinary Practice being to grant a Capias without any Summons, so that the Party is driven to Bail in every trivial Action; and that tho' upon a Writ of Error this Matter is not assignable, because a Fault in the Process is aided by Appearance, &c. yet False Imprisonment lies upon it, and the Officer cannot justify here, as upon Process out of the Courts of Westminster. For suppose an Attachment should go out of the County Court without a Plaint, could he that executes it, justify? Yet a Sheriff may justify an Arrest upon a Capias out of the Common Pleas, tho' there were no Original: But Ministers to the Courts below must see that things be duly done. Wherefore the Plaintiff must have Judgment.

Postea 249.  
And Hodson  
& Cook,  
Postea 369.  
10 Co. 76.  
3 Cro. 446.  
Kelle. 99, a.

## Monk's Case.

**A** Debt was recovered against him in this Court, and the Money levied by the Sheriff, which he did not deliver, but was ordered to bring it into Court, until a difference that arose about it was determined.

Monk being indebted to the King, a Writ was issued out to enquire what Goods and Chattels he had.

The King's Attorney moved, That they might have leave to find this Money; the Court conceived, That the Money being but as a Depositum there, they might find it; and that the Court did not protect it from the Inquisition, as when Goods are under an Attachment they cannot be distrained; but they would not make any Direction for the finding of it.

Blackamore *versus* Mercer.

**I**n a Judgment against an Executor, a Fieri facias issued out to the Sheriff, with a Scire fieri Inquiry, and a Devastavit was found according to the common Course, the return whereof was, quod diversa bona quæ fuerunt testatoris, &c. habuit quæ elongavit & in usum suum proprium convertit.

Ante 20.  
1 Saun. 307.  
2 Saun. 402.  
3 Keb. 62.

It was objected against this Return, That it was not said Devastavit, for in some Cases an Executor may justly convert the Goods to his own use.

Hale said, Anciently, when the Sheriff returned a Devastavit, which was not found by any Inquisition, and to which there was no Answer, it was necessary to insert the word Devastavit. But otherwise, in a return upon this Special Writ; for if the case be, that he hath not wasted the Goods, but only eloiigned them so as the Sheriff cannot come at them, the Executor is chargeable upon this Writ, de bonis propriis, and this Return answers the Writ.

Perrot *versus* Bridges.

**I**n Trespass, quare clausum fregit, and thereupon his Fences.

The Defendant pleaded Not Guilty to all, but the breaking of the fences, and for that he justifies; for that he was possessed of certain Corn in the place Where, as of his proper Goods, and made a Breach in the Fence, as was necessary for the carrying of it away.

The Plaintiff demurs specially, because he did not shew by what Title he was possessed of the Corn. And the Court were of Opinion, that for that cause the Plea was insufficient; for if a Man enters upon another's Land and sows it, 'tis his Corn while he that hath Right

2 Saun. 401.  
3 Keb. 61.



Right re-enters; so if Tenant at Will sows the Ground, and then determines his own Will, he cannot break the Hedges to carry the Corn away. And Twilden said, If the Sheriff upon a Fieri facias sells Corn growing, the Tenant cannot justify an Entry upon the Land to reap it, until such time as the Corn is ripe.

Anonymus.

3 Keb. 61.

**I**F an Administrator brings an Action, the declaring hic in Curia prolat' of the Letters of Administration is but matter of Form, tho' it hath been held otherwise. For Hale said, 'Tis not part of the Declaration as a Specialty is upon which Debt, Covenant, &c. is brought, but only shewn upon the Declaration, to enable the Plaintiff to bring his Action.

Note, This is aided by a late Act of Parliament.

Jay *versus* Bond.

3 Keb. 17,  
60, 63.

**I**N Trespas the Defendant pleads, That ante Quinden' Sancti Martini præd' Jay excommunicatus fuit & adhuc existit, & protulit hic in Cur' literas testamentarias Episcopi Sarum quæ notum faciunt universis quod scrutatis Registeriis invenitur contineri quod excommunicatus fuit, &c. pro contumacia in non comparendo to a Suit of Tithes, &c. in cujus rei Testimonium præd' Episcopus Sigillum apposuit.

It was objected, That such a kind of Certificate of Excommunication as this is, was not allowable; for it ought to be positive, and under Seal of the Ordinary; whereas this is only a relation of what is found in their Register. Sed non allocatur; for tho' such a form of pleading would be altogether insufficient in our Law; yet their course is sometimes to certify Excommunication, sub sigillo Ordinarii, and sometimes per literas Testamentarias, as here.

Hale said, To plead Letters Patents without saying sub magno sigillo is naught, and that because the King has divers Seals.

Note, The Entry was here quod Defendens venit & dicit, &c. Hale doubted, Whether he ought not to have made some kind of defence, tho' no full defence is to be made, when Excommungement in the Plaintiff is pleaded.

Owen *versus* Lewyn.

**T**HE Plaintiff declared in Action upon the Case, upon the Custom of the Realm against a Common Carrier, and also for Trover and Conversion. Postea 365,  
366.  
3 Keb. 59.

Hale said, So he might, for Not Guilty answers both; but if a Carrier loseth Goods committed to him, a general Action of Trover doth not lie against him.

Termino Sancti Michaelis Anno 24 Car. II.

In Banco Regis.

Davenant against the Bishop of Salisbury.

**I**N Covenant, the Plaintiff declared, That the Bishop of Salisbury the Defendant's Predecessor, being seized in fee, demised unto him certain Lands for 21 years, reserving the ancient Rent, &c. and covenanted for him and his Successors, to discharge all publick Taxes assessed upon the Land; and that since the Defendant was made Bishop, a certain Tax was assessed upon the Land by virtue of an Act of Parliament, and that the Plaintiff was forced to pay it, the Defendant refusing to discharge it, unde Actio accrevit, &c. 3 Keb. 69.  
2 Lev. 68.

The Defendant demurred, first to the form, For that 'tis said that the Predecessor Bishop was seized, and doth not say in jure Episcopatus. But Hale said the Old Books were, That where it was pleaded, that J. S. Episcopus was seized, that it implies seisin in the right of the Bishoprick, which is true if he were a Corporation capable only in his politick Capacity, or as an Abbot, &c. but in regard he might also be seized in his natural Capacity, the Declaration was for this Cause held to be ill. The matter in Law was, Whether this were such a Covenant as should bind the Successor as incident to a Lease, which the Bishop is impowered to make by the 32 H. 8? For 'tis clear, if a Bishop had made a Covenant or Warranty, this had not bound the Successor at the Common Law, without the consent of the Dean and Chapter; and if it should be now taken, that every Covenant would bind the Successor, then the Statute of 1 Eliz. would be of no effect: But Hale said, Admitting this were an ancient Covenant, (and if so, it should have been averred to have been used in former Leases,) to discharge ordinary



ordinary payments, as Pensions or Tenths granted by the Clergy, then it might bind the Successor, by the 32 H. 8. But it were hard to extend it to new charges: And we all know how lately this way of Taxes came in.

But the Court said, That the Declaration being insufficient for the other matter, they would not determine this. But they held, That howsoever this Covenant should prove, it would not avoid the Lease. Vid. Gee, Bishop of Chichester, and Freeland's Case, 3 Cro. 47.

2 Ven. 171.  
T. Jones 39.

Note, Hale said, That antiently when the Sheriff returned a Return upon a Writ, he was admitted to plead to it as to an Indictment. But the course of the Court of later times has been not to admit of any Plea to it, but to drive the Party to his Action upon the Case, as upon the return of a Devastavit, &c.

*Cole versus Levingston.*

2 Keb. 700,  
856.  
2 Keb. 2, 35,  
83, 90, 100,  
124.

**I**N Ejectment, upon a long and intricate Special Verdict, (the Chief Justice said, Never was the like in Westminster-Hall) these following Points were resolved by the Court, and declared by Hale as the Opinion of himself and the rest of the Judges:

Holmes and  
Meynel.  
Trin. 31 Car.  
2 Roll. 1102.  
in B. R. Ch.  
Just. T. Jones  
Rep. 172,  
173, 174,  
179, 180.

First, That where one covenants to stand seized to the use of A. and B. and the heirs of their Bodies, of part of his Land, and if they die without Issue of their Bodies, then that it shall remain, &c. and of another part of his Land to the use of C D. and E. and the heirs of their Bodies, and if they die without Issue of their Bodies, then to remain, &c. that here there are no cross Remainders created by Implication, for there shall never be such Remainders upon construction of a Deed, tho' sometimes there are in case of a Will, 1 Roll. 837.

Secondly, As this Case is, there would be no cross Remainders if it were in a Will, for cross Remainders shall not rise between three unless the words do very plainly express the intent of the Deviser to be so; as where black Acre is devised to A. white Acre to B. and green Acre to C. and if they die without Issue of their Bodies vel alterius eor'; then to remain; there by reason of the words alterius eor', cross Remainders shall be, Dyer 330. But otherwise there would not; Gilbert v. Witty and others, 2 Cro. 655. And in this case, tho' some of the Limitations are between two, there shall be no cross Remainders in them, because there are others between three; and the intent shall be taken to be the same in all.

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The Dean and Chapter of Durham against the Lord Archbishop of York.

**I**n a Prohibition the Archbishop pleaded a Prescription, That he and his Predecessors have time out of mind been Guardians of the Spiritualities of the Bishoprick of Durham, Sede vacante; and Issue was joined thereupon, and tried at the Bar this Term. Postea 234.  
3 Keb. 17, 91.

Hale said, De jure communi the Dean and Chapter were Guardians of the Spiritualities during the Vacancy as to matters of Jurisdiction; but for Ordination they are to call in the aid of a neighbouring Bishop, and so is Linwood: But the Usage here in England is, That the Archbishop is Guardian of the Spiritualities in the Suffragan Dioceses, and therefore it was proper here to join the Issue upon the Usage.

There was much Evidence given, That anciently during the Vacancy of Durham, the Archbishop had exercised Jurisdiction, both sententious, and other, as Guardian of the Spiritualities: But since H. 8. time, it had been for the most part administered by the Dean and Chapter; and the Verdict was here for the Dean and Chapter.

King *versus* Melling.

**I**n an Ejectment, upon a Special Verdict the Case was this; R. Melling seized in Fee, having Issue four Sons, William, Robert, Bernard and John, devised the Land in question in this manner. Ante 214.  
2 Lev. 28.  
3 Keb. 42,  
52, 95.

I give my Land to my Son Bernard for his natural Life, and after his decease, I give the same to the Issue of his Body lawfully begotten on a second Wife, and for want of such Issue to John Melling and his Heirs for ever. Provided, that Bernard may make a Jointure of all the Premises to such second Wife, which she may enjoy during her Life.

R. M. dies, Bernard in the life of his first Wife suffered a Recovery to the use of himself in Fee; and after her decease marries a second Wife, and then by Indenture covenants to stand seized to the use of himself for Life, and after to the use of his Wife for her Life, for her Jointure, and dies.

J. M. enters, and makes a Lease to the Plaintiff: And this Term after Arguments at the Bar, the Court gave their Opinions.

Rainsford for the Plaintiff. First, I hold in this Case, that B. M. takes but an Estate for Life, with a Contingent Remainder to the Issue by his second Wife, for the Devise is by express words for Life; as in Archer's Case, 1 Co. A Devise to R. A. for Life, and after to the next Heir Male of R. and the Heirs Males of that Heir Male; Resolved to create but an Estate for Life to R. A. I rely

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mainly upon Wild's Case, 6 Co. which was brought before all the Judges of England; where the Devise was to a Man and his Wife, and after their Decease to the Children: And resolved to be but an Estate for Life. 'Tis true, there were Children at the time of the Devise, but in the end of the Case 'tis said, that in such Case if there were no Children, the Children born after, might take by Remainder, and the first Estate to be but for Life. Clerk v. Day, 1 Cro. 313. The Devise to Rose his Daughter for Life, and that if she married after his Death and had Heir of her Body, then, that the Heir after his Daughter's Death should have the Land, and to the Heirs of their Body begotten, and if his Daughter died without Issue, then to a Stranger. It was held by Gawdy and Fenner, that Rose had but an Estate for Life in this Case. 1 Roll. 837. Devise to his eldest Son for Life, and after his Decease to the Sons of his Body lawfully begotten; the Son resolved to have but an Estate for Life.

The Second point; Whether the power to make a Jointure be destroyed by the Common Recovery? These powers to make Estates are of two sorts, either Collateral, as when Executors have power by a Will to sell Land, and such a power cannot be destroyed, as appears in Diggs's Case, 1 Co. Or powers appendant to Estates, as to make Leases, which shall continue after the Estate, to which the power is annexed, determines; and the power in the Case at Bar to make a Jointure is of this second sort, and is destroyed by the alteration of the Estate to which it is annexed in Privy, as 1 Co. Albany's Case is; so that the Common Recovery being a Forfeiture of the Estate for Life, by consequence 'tis an Extinction of the power.

Thirdly; But admitting the power continues, whether it be well executed? And I hold that it is not; for being seized in Fee at the time of the Covenant to stand seized to the use of his Wife for her Jointure; and this without any reference to his power, the Use shall arise out of his Interest, and not to be executed by virtue of his power, according to the resolution in Sir Ed. Cleere's Case, 6 Co.

Twisden of the same Opinion. As to the first Point it must be agreed, that these words, Issue of the Body, ex vi termini make not an Entail, if they were in a Conveyance by Act executed, no more than Children, as the words were in Wild's Case. 'Tis true, in a Will a Devise of Land to a Man and his Issue creates an Entail, if the Devisee had no Issue at that time, for otherwise those words would be void; for in regard they are limited to take presently, the Issue born after, cannot take as by Remainder, there being none to take in presenti, they must be intended to be words of Limitation; as a Devise to a Man and his Heirs Males makes an Entail, or otherwise the word Males must be rejected; then seeing the words in themselves are not proper to make an Entail, the  
next

next thing to be considered is the Intention, which is to be known by the expressions in the Will, and not any averment dehors. The words are, I will give my Land to my Son for Life, and after his decease I will give the same to the Issue, &c. so that the Land is given to him expressly for Life. Devise of Land in perpetuum makes a Fee; but if Land be given by Deed in perpetuum, there an Estate only for Life will pass. 15 H. 7. A Devise to one paying 10 l. this is a Fee. 6 Co. Collier's Case; But a Devise to one for Life paying 10 l. makes but an Estate for Life. The Case of Furse and Winter was Mich. 02 Trin. 13 Regis Caroli Rot. 1339. A Devise to his two Daughters equally to be divided between them, and to the Survivor of them and to the Heirs of the Body of the Survivor. This was so expressly to the Survivor, that it was resolved to be a Joint Estate, and not in Common. The words here are after the decease of Bernard, I give the same to the Issue of his Body, &c. implying that the Issue should take by Purchase as a Gift, and not by Descent.

Again, The power given to Bernard to make a Jointure shews, that he could not do it by Virtue of his Estate, and therefore needed a power to be annexed. And tho' such powers are usually affixed to Estates Tail; yet when the construction is doubtful, what Estate shall pass, the giving such a power is an argument, that 'tis such an Estate, that cannot make a Jointure, or the like, by any other means. The words go further, And for want of such Issue, then to J. M. 'Tis true, if Land be devised to a Man, and if he dies without Issue then to remain over, the Devisee shall have an Entail. Owen 29. But it shall not be so in this Case, because that Clause is crowded in with other Clauses directly to the contrary. I rely mainly upon Wild's Case, 6 Co. and the Case quoted out of *Postea* 231. Benloe in the end of that Case: A Devise to Baron and Feme, and to the Men Children of their Bodies begotten; because it did not appear that there were any more Children at that time, this made an Estate Tail. But if it had been, and after their decease to their Children, then the Children should take by Purchase tho' born after. 'Tis true, that case is variously reported in the Books, but I adhere to my Lord Coke, presuming, that that being brought before all the Judges in the Argument of Wild's Case, it was a true Report.

As for the second Point 'tis plain, That the power is extinguished; for by the Recovery, the Estate for Life to which it was annexed in privacy is gone and forfeited, so that 'tis not necessary to dispute the third Point, Whether well executed or no? But upon the whole I agree with my Brother Rainsford, that the Plaintiff ought to have Judgment.

Hale. I differ from my two Brothers, and tho' I was of their Opinion at the finding of the Special Verdict, yet upon very great Consideration of the Case, I am of Opinion for the Defendant. I shall proceed in a different method from my Brothers, and



begin with that Point which they made last ; and I agree with them, admitting that Bernard had but an Estate for Life, that the power was destroyed ; also here the Recovery does not only bar the Estate, but all powers annexed to it ; for the recompence in value is of such strong consideration, that it serves as well for Rents, Possibilities, &c. going out of and depending upon the Land, as for the Land it self : So Fines and Feoffments do ransack the whole Estate, and pass, or extinguish, &c. all Rights, Conditions, Powers, &c. belonging to the Land, as well as the Land it self.

Secondly, I agree with my Brother Rainsford, that if Bernard had but an Estate for Life by the Devise, the power was not well executed. Where Tenant for Life has a power to make Leases, 'tis not always necessary to recite his power when he makes a Lease ; but if he makes a Lease, which will not have an effectual continuance, if it be directed out of his interest, there it shall be as made by virtue of his power ; and so it was resolved in one Rogers's Case, in which I was Counsel.

Again, Tho' it be here by Covenant to stand seized, (an improper way to execute his power) yet it might be construed an Execution of it. Mich. 51. in this Court, Stapleton's Case ; where a Devise was to A. for Life, Remainder to B. for Life, Remainder to C. in Fee, with power to B. to make his Wife a Jointure. B. covenanted to stand seized for the Jointure of his Wife, reciting his power ; tho' this could not make a legal Jointure, yet it was resolved to enure by virtue of his power ; Quando non valet quod ago ut ago, valeat quantum valere potest. But in this Case Bernard has got a new Fee, which tho' it be defeisible by him in Remainder ; yet the Covenant to stand seized shall enure thereupon, and the Use shall arise out of the Fee.

Thirdly, I was at the first opening of the Case of Opinion, that Bernard had but an Estate for Life ; but upon deep Examination of the Will, and of the Authority, and Considerations of the Consequences of the Case, I hold it to be an Estate Tail.

And first, To ease that Point of all difficulties, it cannot be denied, but a Devise to a Man, and the Heirs of his Body by a second Wife, makes an Estate Tail executed, tho' the Devisee had a Wife at the time. As the Case often cited, where Land is given to a married Man and a married Woman, and the Heirs of their Bodies. We are here in case of the Creation of an Estate Tail, where intention has some influence (voluntas donatoris, &c.) and may help words which are not exactly according to legal form. 39 Aff. 20. Land given to a Man and his Wife, & heredi de corpore & uni heredi tantum, this judged an Entail. Again, we are in case of an Estate Tail to be created by a Will, and the intention of the Testator is the Law to expound the Testament ; therefore a Devise to a

1 Leon. 212.

2 And. 138.

Man and his Heirs Males, or a Devise to a Man, and if he dies without Issue, &c. are always construed to make an Entail. It must be admitted, that if the Devise were to B. and the Issue of his Body, having no Issue at that time, it would be an Estate Tail; for the Law will carry over the word Issue, not only to his immediate Issue, but to all that shall descend from him: I agree it would be otherwise, if there were Issue at that time. Tayler and Sayer, 41 Eliz. Rot. 541. a Devise to his Wife for Life, Remainder to his Issue, (having two Children) it was held the Remainder was void, being to the Issue in the singular number, for uncertainty which should take. But that was a little too rank, for Issue is nomen collectivum.

Again, I agree, if a Devise be made to a Man, and after his death to his Issue (or Children,) having Issue at that time, they take by way of Remainder. And that was the only Point adjudged in Wild's Case, and there also against the Opinion of Popham and Gawdy.

1 Cro. 742.  
Raym. 83.  
2 And. 134.

This way being made, I come to the Case it self, and shall briefly give my Reasons, why I hold Bernard has an Estate Tail.

First, Because the word Issue is nomen collectivum, and takes in the whole Generation ex vi termini; and so the Case is stronger than if it were Children: And where it is said, to the Issue that he shall have of the Body of the second Wife, that is, all that shall come of the second Wife: For so 'tis understood in common Par-  
lance.

Secondly, In all Acts of Parliament, Exitus is as comprehensive as Heirs of the Body. In Westm. 2. de donis, Issue is made a term of equivalence to Heirs of the Body; for where it speaks of the Alienation of the Donee, 'tis said, quo minus ad exitum descenderet. So in 34 H. 8. of Entails settled by the Crown.

'Tis true, In Conveyances, &c. the wisdom of the Law has appropriated the word Heirs as a Term of Art. In Clerk's Case; A Lease was made to commence after the death of his Son without Issue; the Son had a Son and died, and then that Son died without Issue. It was resolved both in the King's Bench and the Exchequer, That the Lease should commence; for Issue being nomen collectivum, whenever the Issue of the Son failed, the term of Commencement did happen.

3 Lev. 99.  
1 Sid. 102.  
2 Keb. 462.  
1 Lev. 36.

But now to see the difference: Tyler's Case, Mich. 34 Eliz. B. R. He had Issue A. B. C. and D. and devised to his Wife for Life, and after her death to B. his Son in Tail, and if he dies without Issue, then to his Children. A. had Issue a Son and died, and B. died without Issue.

Resolved,



Resolved, That the Son of A. Should not take as one of the Children of the Testator. Which Case I cite, to shew the odds between the word Issue and the word Children.

My second Reason is from the manner of the Limitation, which is to his Issue, and of his Body lawfully begotten upon the second Wife; Phrases agreeable to an Estate Tail; and the meaning of a Testator is to be spelled out by little Hints. It is admitted in Wild's Case in the 6 Co. 17. that if the Devise had been to the Children of their Bodies, it would have been an Entail.

Thirdly, It appears by the Devise, that the Testator knew there could be no Children at that time, and shall not be supposed to intend a contingent Remainder.

Fourthly, It appears that the Testator did not intend to prefer the Children of the first Wife of Bernard, but did the Children of the second, and therefore cannot be thought to mean, that John, the younger Brother of Bernard, should take before failure of the Issue which Bernard should have by his second Wife. And to this purpose is Spalding's Case 3 Cro. 185. A Devise to his eldest Son and the Heirs of his Body after the death of his Wife; and if he died living the Wife, then to his Son N. And devised other Lands to another Son, and the Heirs of his Body; and if he died without Issue, then to remain, &c. The first Son died living the Wife: It was strongly urged that his Estate should cease; for being said, If he died living the Wife, this was a Correction of what went before. But 'twas ruled by all the Court, That it was an absolute Estate Tail in the first Son, as if the words had been, If he died without Issue living the Wife; for he could not be thought to intend to prefer a younger Son before the Issue of his eldest.

1 Bulst. 219.  
1 Roll. 836.  
N. 11.

Fifthly, The words are further, And for want of such Issue, then to John; which words in a Will do often make an Estate Tail by Implication: As 4 Jac. Robinson's Case: A Devise to A. for Life, and if he died without Issue, then to remain; A. took an Entail. So Burley's Case, 43 Eliz. A Devise to A. for Life, Remainder to the next Heir Male; and for default of such Heir Male, then to remain. Adjudged an Estate Tail. 'Tis true, Dyer 171. is, where Lands were devised to a Man and the Heirs Males of his Body, and if he died without Issue, &c. these last words did not make a Tail General to the Devisee: For an Implication of an Estate of Inheritance shall never ride over an express limitation of an Inheritance before; being 'tis said here, for want of such Issue the Land should remain, 'tis plainly meant, That it should not before the Issue failed, and then the Issue must have so long (for none else can.) and so 'tis an Estate Tail.

T. Jones  
172, 173.  
2 Cro. 656.  
1 Mod. 189.  
Vaugh. 263,  
264, 265,  
266, 267.

I come now to Authorities: 6 Eliz. Anderson, num. 86. Moor. <sup>1 And. 43.</sup> pl. 397. A Devise to his eldest Son for Life, and after his decease to <sup>Ben. 30.</sup> the Men Children of his Body, said to be an Estate Tail; and so cited by Coke in that Book, and so contrary to his Report of it in Wild's Case, Benloe num. 124. But that Case is not so strong as this; for Children is not so operative a word as Issue. Rolle 839. A Devise to his eldest Son for Life, & non aliter, (for so <sup>Ante 227.</sup> were the words, tho' not printed in the Book) and after his decease to the Sons of his Body; it was but an Estate for Life, by reason of the words Non aliter. Hill. 13 Car. 2. Rot. 121. Wedgward's Case; A Devise to his Son Thomas for Life, and after his decease (if he died without Issue living at his death) then to the Daughter, &c. it was held to be an Estate for Life. But were it an Estate Tail or no, it was not necessary to be resolved, the Case depending upon the destruction or continuance of a Contingent Remainder, which would have been gone had the Devise made an Estate Tail; again, there being an express Devise for Life, they would not raise a larger Estate by Implication.

Again, Wild's Case, where Lands were devised to A. for Life, Remainder to B. and the Heirs of his Body, Remainder to Wild and his Wife, and after their decease to their Children. And the Court of King's Bench were at first divided: Indeed it was afterwards adjudged an Estate for Life to Wild and his Wife;

First, Because having limited a Remainder in Tail to B. by the express and usual words; if he had meant the same Estate in the second Remainder, 'tis like he would have used the same words.

Secondly, It was not, after their decease to the Children of their Bodies; for then there would be an Eye of an Estate Tail.

Thirdly, The main Reason was, because there were Children at the time of the Devise; and that was the only Reason the Resolution went upon in the Exchequer-Chamber. And tho' it be said in the latter end of the Case, That if there were no Children at that time, every Child born after might take by Remainder; 'tis not said positively that they should take: And it seems to be in opposition to their taking presently; but however that be, it comes not to this Case: For tho' the word Children may be made nomen collectivum, the word Issue is nomen collectivum of it self. Hill. 42 and 43 Eliz. Bifield's Case; A Devise to A. and if he dies not having a Son, then to remain to the Heirs of the Testator. Son was there taken to be used as nomen collectivum, and held an Entail.



I come now to answer Objections :

First, 'Tis objected, that in this Case the Limitation is expressly for Life, and in that respect stronger than Wild's Case : And this is the great difficulty.

But I answer ;

That tho' these words do weigh the Intention that way, yet they are balanced by an apparent Intention that weighs as much on the other side ; which is, That as long as Bernard should have Children, that the Land should never go over to John ; for there was as much reason to provide for the Issue of the Issue, as the first Issue.

Again, A Tenant in Tail has to many purposes but an Estate for Life.

Again, 'Tis possible that he did intend him but an Estate for Life, and 'tis by consequence and operation of Law only that it becomes an Estate Tail. 1651. Hanly and Lowther : The Case was, A Copyholder surrendered to the use of his Will, and devised to his first Son for Life, and after his decease to the Heir Male of his Body, &c. This was ruled to be an Estate Tail ; and this differs from Archer's Case in the 1st of Co. for that the Devise there was for Life, and after to the Heir Male, and the Heirs of the Body of that Heir Male : There the words of Limitation being grafted upon the word Heir, it shews that the word Heir was used as Designatio personæ, and not for the Limitation of the Estate. So is the Case of Clerk and Day, 1 Cro. 313.

Another Objection was, That there being a Power appointed to Bernard to make his Wife a Jointure, it shews, that it was intended he should have but an Estate for Life, which needed such a Power, and not an Estate Tail ; for then he might have made a Jointure without it.

I answer, That Tenant in Tail cannot by vertue of such Estate, make a Jointure, without discontinuing or destroying his Estate. Sed Judicium pro Quer'. there being Justice Twisden and Justice Rainsford against the Chief Justice. Ante 215.

[This Judgment was afterwards reversed in the Exchequer Chamber. 2 Lev. 58.]

Termino

Termino S. Hillarii Anno 24 & 25 Car. II.

In Banco Regis.

Anonymus.

**A** Prohibition was prayed to the Ecclesiastical Court, for that they cited one out of a Diocess to answer a Suit for a Legacy: But it was denied, because it was in the Court where the Probate of the Will was. For tho' it were before Commissioners appointed for the Probate of Wills in the late Times; yet now all their Proceedings in such cases are transmitted into the Prerogative Court. And therefore Suits for the Legacies contained in such Wills ought to be in the Archbishop's Court; for there the Executor must give account and be discharged, &c.

Note, When a man is in Custodia Marecalli, any man may declare against him in a Personal Action; and if he be bailed out, he is still in Custodia to this purpose, (viz.) quoad Declarations brought in against him that Term: For the Bail are (as it were) delegated by the Court to have him in Prison. Hob. 1 Mod. 16. Cr. Jac. 568.

Error is not well assigned, That there was no Bail filed; unless added, That the Defendant was not in Custodia. Hob. 264.

Mildmay and Case.

**I**n an Action of Debt upon a Sheriff's Bond, the Case was this: Raym. 220. 3 Keb. 111.

A man was arrested upon a Latitat, in placito Transgr' ac etiam billæ pro 40 l. de debito. And the Condition of the Bond given to the Sheriff was, To appear at the Day of the Return of the Writ, to answer to the Plaintiff in pl'ito debiti. And it was urged, that this made the Bond void by the Statute of 23 H. 6. for the Condition should have been to appear at the Day, to answer in the Action upon which the Process went out, and that was in this Case but an Action of Trespass, and the adding the Ac etiam debiti, &c. is but to satisfy the late Act, and for direction to the Sheriff, to what Value he shall require Bail. And it was usual to endorse the Cause of Action before the Statute upon the Latitats, that the Sheriff might insist upon Bail accordingly. So this is a material Variance from the Statute, and not like some of these which are remembered in Beaufage's Case in the 10 Co. and Dyer 364. And to this the Court inclined. 2 Cro. 286.

h b

And



And Hale cited a Case between Button and Low, adjudged Mich. 1649. An Attachment went out of Chancery to answer coram nobis in Cancellaria ubicunque, &c. and the Sheriff took a Bond, conditioned to appear coram Rege in Cancellaria ubicunque, &c. apud Westmonasterium: And for the addition of Westminster, the Bond was held to be void.

2 Ven. 238.  
contra.

#### Anonymus.

Ante 225.

**T**HE Court was moved for a Prohibition to the Archbishop's Court, to stop their Proceedings in a Cause belonging to the Jurisdiction of Durham, upon a Suggestion, that the Dean and Chapter of Durham, Sede vacante, have Cognizance there, as Guardians of the Spiritualities.

And the Court granted a Prohibition; for the Right of Jurisdiction was tried between the Archbishop and Dean and Chapter the last Term, and found against the Archbishop; and therefore he was concluded by that Verdict, until the Record was reversed by Error or Attaint.

#### Thody's Case.

3 Keb. 111,  
17, 370.  
Ante 12, 18.

**T**HODY and two others were indicted, for that Conspirations inter eos habita, they enticed J. S. to play, and cheated him with False Dice.

Thody pleaded, and was found Guilty; the others not having pleaded. It was moved, that Judgment might not be entered against him until the others came in; for being laid by way of Conspiracy, if the rest should chance to be acquitted, no Judgment could be given against him: And so is 14 H. 6, 25.

Hale said, If one be acquitted in an Action of Conspiracy, the other cannot be Guilty: But where one is found Guilty, and the other comes not in upon Process, or if he dies hanging the Suit, yet Judgment shall be upon the Verdict against the other. And so is 18 E. 3. 1. and 24 E. 3. 34.

1 Saun. 229,  
230.

Wylde said, The difference was, where the Suit was upon Conspiracy wherein the Willandus Judgment was to be given, and where the Conspiracy is laid only by way of Aggravation, as in this Case.

Ante 12,  
18, 19.

Hale said, It would be the same in an Action against two upon the Case for Conspiracy; but not in such Actions, where tho' there be a charge of Conspiracy, yet the Gift of the Action is upon another matter,

But the Court said, They would give him two or three days for the bringing in of the other two, and defer the Entry of the Judgment in the mean time.

Methyn

*Methwyn versus the Hundred of Thistleworth.*

**T**he Case was moved again by North, Solicitor. He urged for the Plaintiff, That the Issue being, Whether they took the felon upon Fresh Suit? It being not found that there was any actual Taking, or that the Fresh Suit continued until Sir J. Ash found the felon in the presence of Sir P. Warwick. Also, it was found that Sir J. Ash was a Justice of Peace, and therefore it was his duty to apprehend him.

Ante 118.  
Raym. 221.  
2 Leon. 4.  
2 Keb. 769.  
3 Keb. 115.

To this it was answered,

That the Statute of Winton (upon which the Action is founded, and not upon the 27 of Eliz. and therefore it is ill if it concludes contra formam Statutorum) doth not say shall Take, but shall Answer the Bodies of the Offenders; which is, Answer them to Justice: And therefore if the felon be taken upon another account, and the Country finding him in Prison, cause him to be indicted, this satisfies the Statute, Goldsb. 55.

Again, It was more decent for Sir John Ash being concerned as an Inhabitant of the Hundred to leave this Matter to the other Justices of the Peace; for it has been known, that Justices of the Peace have been censured in the Star-Chamber, for being too forward to interpose in their own business: But if it were an omission of the Duty of his Office, that could not be objected to him as an Inhabitant, having done enough to satisfy the Statute of Winton.

Wylde said, That the Defendant should have demurred because, the Issue is ill joined, (viz.) absque hoc that he took him super eadem recenti infecutione: For if he were not immediately taken upon Fresh Pursuit it were sufficient; but the Verdict finding Fresh Suit was made, it may be taken by Intendment (which shall help out a Special Verdict,) that it was directed this way and continued until the finding of him in the presence of Sir P. Warwick. Et sic Judicium pro Def. Ante 118.

*Dacres versus Duncomb.*

**I**n Crover, after Imparance the Defendant pleaded, That the Plaintiff (with two others) brought Crover for the same Goods before, which Action is still depending: And demanded Judgment of the Writ.

2 Lev. 82.  
3 Keb. 127.  
Postea 249.

The Plaintiff replied, That the other two died before this Action was brought, and so that Writ abated. To which it was demurred, and Judgment quod respondeat ouster: For in all Actions, where one Plaintiff dies, the Writ abates; (save in an Action brought by two Executors.) And Hale said, So it is which alters the Law very much in these Cases. The Title of the Act is, For the better preventing of Frivolous and Vexatious Suits.

See now a new Statute made about 8 and 9 W. which alters the Law ve-



should in a Quare Impedit; but that it is revivable by Journey's Accounts.

Wylde said, That the Pleading, That the two died before the Action brought, was double.

Hale. No, for he must shew both were dead to enable him to bring this Action alone.

Twisden. How comes this Plea in Abatement after an Imparlance?

1 Cro. 9.  
contra.  
1 Sid. 319.

Hale. Tho' after an Imparlance the Defendant cannot plead a Misnomer, or the like, or Ancient Demesne; because he admits he ought to answer the Writ; yet such a Plea in Abatement as this he may. But that comes not in question; because the Plaintiff replied to it, and did not demur.

2 Lev. 80.  
3 Keb. 135.  
1 Saun. 238.  
1 Sid. 240,  
266.

Nota, Debt for Rent in the Detinet against an Executor, may be brought where the Lease was made; because 'tis for the Arrears in the Testator's time: But where 'tis in the debet and detinet, (viz.) for Rent incurred in the Executor's time, it must be where the Land lies. And so agreed by the Court.

Nota, No Tithes to be paid for Pasture wherein the Plow-horses are fed.

And Hale said, So it is of Saddle-horses.

Anonymus.

**A** Foreign Attachment in an Inferiour Court was pleaded in this manner: That by Custom (time out of mind) whoever levied a Plaint, pro aliquo debito, against another, upon Surmize, That a Stranger was indebted to the Defendant, that Process issued forth to attach, &c.

Against this Pemberton objected, That it was not said pro aliquo debito which did arise infra Jurisdictionem Curiae.

The Court said, That they need not express that the Debt did arise infra Jurisdictionem; for perhaps it did not. And yet, if an Action be brought in such case, and the Debt be laid to be contracted infra Jurisdictionem Curiae, if the Defendant will plead to it he may; but he shall never be admitted to assign for Error in Fact, that the Debt did arise extra Jurisdictionem Curiae. But if he had tendered such a Plea in the Inferiour Court upon Oath; then, if they had refused it, it would have been Error. Wherefore 'tis enough in this case to say, If a Plaint were levied pro aliquo debito infra Jurisdictionem without averring that the Debt did arise within the Jurisdiction. Also there cannot be a Custom for a Foreign Attachment, before there be some Default in the Defendant. Wherefore the pleading was there held to be ill.

Postea 369.  
Vaugh. 405.  
Kelle. 55, a.  
1 Mod. 81.

Mosdel

Mofdel, the Marshal of the Court, against Middleton.

**I**n Debt upon a Bond with Condition to be a true Prisoner, and Raym. 222.  
to pay him so much by the Week for Chamber-Rent.

To this was pleaded the Statute of 23 H. 6. And the Court re- 1 Saun. 161.  
solved, It was void by that Statute.

Hale said, A Bond for true Imprisonment is good prima facie; 1 Sid. 383.  
but the Defendant may averr, that it was also for ease and favour. 3 Keb. 133.  
And so it was adjudged in Sir John Lenthall's time, who brought  
Debt upon a Bond of 2000l. and the Party pleaded, That it was  
taken for ease and favour; and upon the Trial it appeared, That  
after the Bond entred into, the Defendant was permitted some-  
times to go into the Country with a Keeper, whereas before he  
was kept strait Prisoner; and upon this matter the Bond was  
ruled to be void.

Twisden cited my Lord Hob. That a Gaoler could not take a  
Bond of his Prisoner for a just Debt.

Hale. That seems hard, because he takes it in another capacity.  
But he cannot take a Bond for his fees, because it would give him  
opportunity to extort. Also, here part being against the Statute it  
avoids all, but the Condition of a Bond or Covenant may in part  
be against the Common Law, and stand good in the other part.

*Cox versus Matthews.*

**I**n an Action for a Nuisance, in stopping of the Lights of his 3 Keb. 133.  
House; Postea 239,  
248.

Exception was taken to the Declaration, For that he did not say  
antiquum Messuagium; and yet it was ruled to be good enough,  
for perhaps the House was new built: And the truth of this Case  
was said to be, That the Defendant had built the House and let it  
to the Plaintiff, and would now go to stop up the Lights.

Hale said, If a Man hath a Watercourse running thorough his  
Ground, and erects a Mill upon it, he may bring his Action for  
diverting the Stream, and not say antiquum molendinum; and up-  
on the Evidence it will appear, Whether the Defendant hath Ground  
thorough which the Stream runs before the Plaintiff's, and that he  
used to turn the Stream as he saw cause, for otherwise he cannot  
justify it, though the Mill be newly erected.

Watson



Watson *versus* Snaed.

**I**N Debt for 20 l. the Plaintiff declared, That the Defendant concessit se teneri per scriptum suum obligatorium, &c. the words of the Deed were, I do acknowledge to Edward Watson by me Twenty Pounds upon Demand, for doing the work in my Garden.

Upon a Demurrer to the Declaration, it was adjudged a good Bond.

Morfe *versus* Slue.

2 Lev. 69.  
Dev. 190.  
Raym. 220.  
1 Mod. 85.  
3 Keb. 72,  
112, 135.  
2 Keb. 866.  
Molloy 4, 9,  
10, 11, 203.

**T**HIS Case was argued two several Terms at the Bar, by Mr. Holt for the Plaintiff, and Sir Francis Winnington for the Defendant, and Mr. Molloy for the Plaintiff, and Mr. Wallop for the Defendant; and by the Opinion of the whole Court, Judgment was given this Term for the Plaintiff.

Hale delivered the Reasons as followeth:

First, By the Admiral Civil Law the Master is not chargeable, pro damno fatali, as in case of Pirates, Storm, &c. but where there is any negligence in him he is.

Secondly, This Case is not to be measured by the Rules of the Admiral Law, because the Ship was infra corpus Comitatus.

Then the first Reason wherefore the Master is liable is, because he takes a Reward; and the Usage is, That half Wages is paid him before he goes out of the Country.

Secondly, If the Master would, he might have made a Caution for himself, which he omitting and taking in the Goods generally, he shall answer for what happens. There was a Case (not long since) when one brought a Box to a Carrier, in which there was a great Sum of Money, and the Carrier demanded of the Owner what was in it, he answered, That it was filled with Silks and such like Goods of mean value; upon which the Carrier took it, and was robbed. And resolved that he was liable. But if the Carrier had told the Owner, That it was a dangerous time, and if there were Money in it, he durst not take charge of it; and the Owner had answered as before, this matter would have excused the Carrier.

Thirdly, He which would take off the Master in this Case from the Reason must assign a difference between it, and the Case of a Hayman, Common Carrier or Inholder.

'Tis objected, That the Master is but a Servant to the Owners.

Answer. The Law takes notice of him as no more than a Servant. 'Tis known, that he may impawn the Ship if occasion be, and sell bona peritura: He is rather an Officer than a Servant. In an Escape the Gaoler may be charged, though the Sheriff is also liable;

Molloy 205.  
1 Roll. 530.  
Molloy 9,  
10, 208.  
2 Cro. 330.  
Hob. 11.

4 Co. South-  
cote's Case.

for respondeat superior. But the Turnkey cannot be sued, for he is but a meer Servant; By the Civil Law the Master or Owner is chargeable at the Election of the Merchant.

'Tis further objected, That he receives Wages from the Owners. Molloy 210.

Answer. In effect the Merchant pays him, for he pays the Owners Freight, so that 'tis but handed over by them to the Master: If the Freight be lost, the Wages are lost too; for the rule is, Freight is the mother of Wages; therefore tho' the Declaration is, That the Master received Wages of the Merchant, and the Verdict is, That the Owners pay it, 'tis no material Variance.

Objection. 'Tis found, that there were the usual Number of Men to guard the Ship. Molloy 209.

Answer. True, for the Ship, but not with reference to the Goods, for the Number ought to be more or less as the Port is dangerous, and the Goods of Value. 33 H. 6. 1. If Rebels break a Gaol, so that the Prisoners escape, the Gaoler is liable; but it is otherwise of Enemies; so the Master is not chargeable, where the Ship is spoiled by Pirates. And if a Carrier be robbed by an Armed Men, he is never the more excused. Ante 190. Molloy 211. Molloy 209.

*Cox versus Matthews.*

**T**he Case was moved again, and Hale said, That if a Man builds an House upon his own Ground, he that hath the Contiguous ground may build upon it also, tho' he doth thereby stop the Lights of the other House; for *cujus est solum ejus est usque ad cælum*; and this holds, unless there be Custom to the contrary, as in London. But in an Action for stopping of his Light, a Man need not declare of an ancient House; for if a Man should build an House upon his own ground, and then grant the House to A. and grants certain Lands adjoining to B. B. could not build to the stopping of A's Lights in that Case, 1 Cro. Sands and Trefusess 575. But the Case at Bar is without question, for he declares, That the Defendant fixed Boards to the Windows of the Plaintiff's House.

Postea 248.  
Ante 237.  
Poph. 170.  
1 Sid. 167.  
Raym. 87.  
Hob. 131.

*Anonymus.*

**U**pon a Motion to set aside an Inquisition taken before the Comoner, *super visum corporis*, certified into this Court, that J.S. killed himself, and was *Non compos mentis*, Hale said, Such an Inquisition that finds a Man *Felo de se* is traversable, but no Traverse can be taken to make a Man *Felo de se*; but *fugam fecit* is never traversable. Postea 278.

Clus



Clue *versus* Bailly.3 Keb. 127,  
139.

**I**N Replevin the Defendant made Conuſance as Baſſiff to J. S. who demised the place *Where*, under a certain Rent, &c.

The Plaintiff traверses the Demise, and concluded, & hoc paratus est verificare. To which the Defendant demurred generally. And the Court were in doubt, *Whether* this ill conclusion of the Plea were not helped upon a general Demurrer?

Hale. It were well the Causes of Demurrer were always assigned specially; and not to say only, incertum & dubium & caret forma, &c. The old way was, when Pleadings were drawn at the Bar, to make the Exception immediately, and the other Party might mend if he pleased, or might demurr if he durst venture it. And tho' now they are put in Paper, yet such a Course should be observed; for Demurrers were not designed to catch Men: This not concluding to the Country seems to be but matter of Form, and the Demurrer should have been quia non bene concludit. Here the Defendant pleads, that J. S. demised the Land for Life, without expressing the place of the Demise, because of necessity it must be upon the Land.

Bake *versus* . . .3 Keb. 103,  
116.  
Raym. 217.

**E**rror of a Judgment in Replevin in the Manor-Court of Hexam in Northumberland, where the Defendant avowed for Damage feſant.

The Plaintiff replied, That J. S. was seized of the Manor of Tallowfield in D. and that time out of mind he had Common, &c. in the place *Where*, and shewed himself to be Tenant, and justified the putting in of his Beasts for Common; and the Prescription being traверsed, it was found for the Avowant. The Errors assigned were.

First, In the Venire, which was, quia nec the Plaintiff, nec the Defendant, aliqua affinitate artingunt, instead of qui nec. Hale said, It was aided by the Statute of 8 H 6. that helps Error in Process. But Twisden said, That Statute did not extend to inferior Courts.

Another Error insisted on was, That the Avowant did not shew that the Manor of Tallowfield was infra Jurisdictionem Curia: But the Venire was, extra vill' & Manerium de Tallowfield, infra Jurisdictionem Curia. But the Court held, That that was not sufficient to intimate that it was within the Jurisdiction, but must have been shewn in pleading. And Hale said, Seeing the Plaintiff had omitted to do it, the Avowant might in his Rejoinder have alledged Tallowfield to have been within the Jurisdiction, as where one pleads a Plea without a place, the other is not bound to demur,

demur, but for his Expedition may shew the place in his Replication. Then Wyldesaid, This seems to be aided by the Statute of 21 Jac. which enacteth, That if the Jury comes out of any one of the places, it sufficeth; and here the Jury came as well out of the Vill where the Beasts were taken, (shewn to be within the Jurisdiction) as the Manor of Tallowfield.

Hale. That will not serve in this Case; for the Court could not award a Venire to a place out of the Jurisdiction, nor Jurors could not be returned out of such a place to try a Cause there.

Another Error assigned was, That the Award of the Venire was præceptum est per Seneschallum, and not said in eadem Curia.

To which it was answered,

That being on the same day upon which the Court was said to be held, it must be intended so.

Wyldesaid, The Judgment ought to be reversed for the last Cause.

Twissden, principally for the first; for he held that the Statute of the 8 H. 6. aided not Process in Inferiour Courts, therefore, where in the Award of the Venire it has been per quos rei veritas melius Scire poterit instead of Sciri, the Judgment has been reversed.

Hale said, That it ought to be Sciri, for so it is in the Regisser, and in the Statute of Eliz. that sets the Estate of Jurors at 4 l. per ann. But for the second Error, he held that the Judgment ought to be reversed.

#### Whaley versus Tancted.

**T**Rin. 23 Car. 2. Rot. 1513. In an Ejectment the Case was this; Lessee for Years makes a Feoffment and levies a Fine, five Years past; Whether the Lessor should have five Years after the Term expired was the Question. And after the hearing of Arguments the Court resolved, That he should, as well as when Lessee for Life levies a Fine, which differs not in Reason from this Case; for there the Lessor may have his Writ de consimili casu presently, as here he may bring his Assize. And though in 9 Co. Podger's Case, 'tis said, That where Lessee for Years is ousted by a Disseisor, who levies a Fine, if five Years pass without Claim the Lessor is barred, that is not the same with this Case; for the Disseisor comes in without the Consent of the Lessee, and of his own Wrong; and if he can defend his Possession five Years he shall hold it; but here all is done with the Privy, and by the Means, of the Lessee who is trusted with the Possession, and it would be of most mischievous Import to Mens Inheritances, if they should not have five Years after the Lease ended; and it being put of a Disseisin in Podger's Case, seems to imply the contrary in other Cases; and tho' there were many notorious Circumstances

Raym. 219.

2 Lev. 52, 55.

2 Vent. 334.

2 Keb. 37.

3 Keb. 30, 37.

110.

Len. Ent.

104.



ces of Fraud in Fermour's Case, which Co. in his Report of it lays much weight upon; yet it does not thence follow, that the Law is not the same where there are not such Evidences of Fraud. In other Books where that case is reported, the Resolution does not seem to go so much upon the Particularities of the Fraud. 'Tis Fraud apparent in the Lessee.

Wilston *versus* Pilkney.

2 Lev. 80.  
Raym. 222.  
3 Keb. 131,  
137.  
Apres. 272.

**I**N Debt for Rent the Plaintiff declared, That the Dean and Chapter of, &c. demised to the Defendant for life; by force of which he entred and demised the Land to the Plaintiff for Years, by virtue of which he was possessed, and afterward granted to the Defendant, reserving a Rent, for which he brings his Action.

To this Declaration the Defendant demurs.

First, Because he doth not say of the Dean's Demise hic in Curia prolar', which Demise must be by Deed.

Secondly, he says, That the Defendant entred by force thereof, which is impertinent to be alledged upon a Lease for life, because Livery implies it.

Thirdly, As to the matter, that the Reservation was void, it being upon a Surrender by Parol. A Rent cannot be reserved upon a Feoffment by Parol; so where Lessee for life or years assigns over his whole Interest, 12 H. 4. 14. 9 H. 6. 43. 12 H. 4. 17. Also no Rent can be reserved upon a Conveyance that works an Extinguishment, unless by Deed, where it is good upon the Contract. Peto's Case, 3 Cro. 101. is, that a Surrender drowns the Interest to all intents and purposes between the Parties. Dyer 251. The Tenant for Life agreed with him in Reversion, that he should have his Land for the Annual Rent of 20 s. 'tis doubted there whether this amounts to a Surrender, there being no Deed or Livery. But in 2 Roll. 497. 'tis said, If it had been a Surrender the Reservation had been void.

1 Roll. 448,  
449.

2 Mod. 174,  
175.

Hale. I do most doubt of the first Exception, because the Deed was not produced. And for the second it were better pleading to have said by force of which he was seised; but that's not of necessity. And as to the matter, the Court resolved for the Plaintiff. For

1. The Reservation was good by the Contract, tho' without Deed. And so it was adjudged in this Court in Manly's Case, that Tenant for Years might assign his whole Term by Parol, rendering Rent; so in the Case of Purcas and Owen, 23 Car. But it was doubted, whether an Action would lie until the last day were past. 'Tis all one where the Grant is made to him in Reversion, which is not actually, but consequentially a Surrender by operation of Law, before which the Contract is perfected, upon which the

14 H. 7. 2. b.

Rent arises. 7 E. 4. is, that the Lessee may surrender upon Condition; and there is no reason, why a Rent cannot be created upon it as well as a Condition. If it were in the Case of Tenant for Life, a Deed were requisite, as well for a Rent as a Condition, in respect of the Freehold, but that is not so in the Case of Tenant for Years. Vide postea Cartwright and Pinkney. Postea 272.

Termino Sanctæ Trinitatis, Anno 25 Car. II.

In Banco Regis.

Hanslap versus Carer.

**I**n Error upon a Judgment in the Court of Coventry, where the Plaintiff Carer declared, That the Defendant being indebted to him infra Jurisdictionem Curie, pro diversis Bonis & Mercimoniis ante tunc venditis & deliberatis, did then and there assume, &c. Upon Non Assumpsit pleaded, and a Verdict and Judgment for the Plaintiff, the Error assigned was, That the Goods were not acknowledged to be sold within the Jurisdiction of the Court. 2 Lev. 87. 3 Keb. 169. T. Jones 230. Raym. 75. 1 Sid. 87.

Hale and Wylde seemed to be of Opinion, That it was well enough, the being indebted and the Promise being laid to be within the Jurisdiction.

Twiden contra, and said, he had known many Judgments reversed for the same Cause.

It being moved again this Term, Hale consented that it should be reversed according as the latter Precedents have been; for he said it was his Rule, Stare decisis; Parsons and Muden, Pasch. 22 Car. 2. Rot. out of Barnstable Court.

John Brown's Case.

**H**e was indicted upon the Statute of 3 H. 7. cap. 2. for the felony of taking away and marrying of one Lucy Ramfy, of the Age of fourteen Years, having to her Portion 5000 l. He was tried at the Bar, and she had appeared upon the Evidence to be this; She was inveigled into Hide-Park by one Mrs. P. Conferred with Brown, (who had prepared a Coach for that purpose) to take the Air in an Evening, about the latter end of May last, and being in the Park, the Coachman drove away from the rest of the Company, which gave opportunity to Brown, who came to the Coach-side in a Usurper-mask, and addressing himself first to Mrs. P. soon



soon perswaded her out of the Coach, and then pulls out a Maid-Servant there attending Mrs. Ramsy; and then gets himself into the Coach, and there detains her until the Coachman carried them to his Lodgings in the Strand, where the next Morning he prevails upon her, (having first threatned to carry her beyond Sea if she refused) to marry him, but was the same Day apprehended in the same House.

It was at first doubted, Whether the Evidence of Lucy Ramsy was to be admitted, because she was his Wife de facto, tho' not de jure. But the Court seriatim deliver'd their Opinions, That she was to be admitted a Witness.

First, For that there was one continuing Force upon her, from the beginning till the Marriage; wherefore whatsoever was done while she was under that Violence was not to be respected.

Secondly, As such Cases are generally contrived, so hainous a Crime would go unpunished, unless the Testimony of the Woman should be received.

Cro. Car.  
483, 485,  
488, 492.

Thirdly, In Fulwood's Case, reported in 1 Cro. (which was read in the Court) the Woman was a Witness, tho' married as here; and Rainsford cited my Lord Castlehaven's Case, where the Countess gave Evidence, That he assisted the committing a Rape upon her: But Hale said he was not governed by that case, because there was a Wife de jure. The Evidence being clear as to all the Points of the Statute, (viz.)

First, That the taking was by Force.

Secondly, That the Woman had Substance according to the Statute.

Thirdly, That Marriage ensued, tho' it did not appear she was deflowered, the Jury found him Guilty. Whereupon Judgment was given, and he was hanged.

Note, 39 Eliz. cap. 9. takes away Clergy for this Offence.

Bayly *versus* Murin.

3 Keh. 46,  
107, 193.  
2 Lev. 61.

**I**n an Ejectment upon a Special Verdict, the Case was to this effect.

One Cooper, Vicar of Cranbrook in Kent, being seised of an House and Lands thereunto appertaining, parcel of the Endowment of his Vicarage, situate in a Market-Town, in the Year 1672. lets it for three Years, and one Year of the said Lease being expired the 1<sup>st</sup> of Sept. 1673. lets it for 21 Years, to begin from Michaelmas following, reserving the Rent during the Term, payable at the usual Feasts, or within ten days after; this Lease was confirmed by the Archbishop, (Patron of the Vicarage) and Dean and Chapter of Canterbury.

1 Inst. 300. b.

Some

Some Years after Cooper dies, and the Question was, Whether Buck (the succeeding Vicar) could avoid this Lease?

The first Point was, Whether the Lease came void within 80 Days after the Death of Cooper, by the Statute of Non-residence? <sup>13 Eliz. 20.</sup> And as to that all the Justices were of Opinion, That Death would not make such a Non-residence as should avoid the Lease; for the Intention of the Statute was, to oblige the Incumbents to Residence.

First, By imposing of the Forfeiture of a Year's Value of their Benefice, if they did not reside.

Secondly, By making their Lease void; which tho' prima facie seemed to be to their Advantage, yet was not so in the consequence; for none would be induced to farm their Lands, because it was in their power to defeat their Leases by Non-residence.

Again, 'Tis plain the Statute meant a Willful Absence, because it says, The Party so offending. The Statute of the 13th of Eliz. that allows Leases of Houses, &c. in Market-Towns for 40 Years, would be of no effect if Death should be interpreted a Non-residence; and the Confirmation of Patron and Ordinary would be to no purpose. Bucler and Goodale's Case in the 6 Co. 21. b. is, that where the Incumbent is absent upon an Inhibition, or for the sake of his health, he is not within the Penalty of that Law. There is only one single Authority against this, (viz.) Mort and Hale's Case in the 1 Cro. 123, which Twissden doubted, Whether it were so adjudged, because my Lord Coke mentions it no where, supposing so notable a Point would not have escaped his Observation, especially in a Case wherein he was Counsel. But Hale said, It was adjudged by the Opinion of three Judges; tho' in Moor 'tis said, the Court was divided; but it was a hard Opinion: And in the 38th of Eliz. B. R. Moor 609. the very Point was adjudged contrary.

The second Point, Whether it were void, because the Rent was reserved at the usual Feasts, or within ten days after? For it was urged, That the Term ending at Michaelmas, would be expired before the last Payment; and for the other Payments, 'tis for the Successor's advantage, because the Predecessor may die within the ten Days. But the Court were clear of Opinion, in regard the Reservation was during the Term, that there should be no ten Days given to the Lessee for the last Payment, according to Barwicke and Foster's Case in the 2 Cro. 227, 233.

The third Point, Whether this were a Lease in Reversion, and so not warranted by the Statute of the 14th of Elizabeth? And all the Court held that it was. This Statute repeals that of the 13th of Eliz. as to Houses in Market-Towns, (which Liberty was given, as Twissden said, to render those places more populous;) but excepts Leases in Reversion, which this is, being to commence at a Day



Day to come, where a Power is annexed to an Estate for Life to make Leases in possession. A Man cannot make a Lease to commence in futuro. In the 6 Co. Fitz-Williams's Case, 4 E. 3. tit. Waste 18. the Lessor made a Lease to commence after the Death of the Tenant for Life, and notwithstanding maintained an Action of Waste: And Co. Li. citing that Case, distinguishes between a Grant of the Reversion, and a Lease in Reversion, as that Case was. In Plowden's Commentaries, Tracy's Case. A Lease made to commence at a Day to come, is given as a most proper Instance of a Lease in Reversion. In the 1 Cro. 546. Hunt and Singleton's Case, a Lease of an House for 40 Years (there being 10 Years unexpired of a former Lease) by the Dean and Chapter of St. Paul's, was held not warranted by the 14th of Eliz. The like was resolved in C. B. 14 Car. 2. in the Case of Wyn and Wild, of a Lease of the Dean and Chapter of Westminster, and there the Court denied the Opinion in Tomson and Trafford's Case, Poph. 9. And two of the Judges seemed to be of Opinion, (and Twisden strongly) That if the Lease in the Case at Bar had been made to commence presently, it yet would have been void, there being another Lease in being; so that for so many Years as were to come of the former Lease, it would be a Lease in Reversion: And that the 18th of Eliz. that permits a concurrent Lease, so that there be not above three Years in being, shall not in their Opinion, make any alteration of the 14th of Eliz. but it only extends to the 13th of Eliz. because it recites that, but not the former. And so is the Opinion of Hobart, in the Case of Crane and Tylour 269. and it hath been often held, That it does not extend to the Statute of 1 Eliz. concerning Bishops. But of this I have doubted, and rather conceived the contrary, (viz. That the Lease had been good, if it had been made to commence presently, there being less than three Years to come of the former Lease. And that of the 18th of Eliz. did give a Qualification to Leases made upon the 14th, as well as the 13th.

First, Because the 14th of Eliz. is a kind of an Appendix to the 13th of Eliz. and does not repeal it, but sub modo a little enlarging it as to Houses in Market Towns: Therefore the 18th of Eliz. reciting the 13th, does by consequence recite the 14th also.

Secondly, There is such a Connexion betwixt all the Statutes, concerning Leases of Ecclesiastical Persons, that they have been taken into the Construction of one another. The Statute of the 32d of H. 8. is not recited, neither in the 1st or the 13th of Eliz. yet a Lease is not warranted upon those Statutes, unless it hath the Qualifications required by the 32d of H. 8. And this course is usual in the Construction of Statutes made in pari materia.

Thirdly,

*loap 14 Substantial*

*v. ab 2 Co. Litt. 66.*

Thirdly, It would make a great Romage in Leases, as he conceived, if a Lease should be void, when there was never so little of a former Lease unexpired.

Fourthly, There is no Authority to the contrary. In Hunt and Singleron's Case, there was 10 Years of the former Lease in being, and upon that lay the weight of the Opinion. And Crane and Taylor's Case is concerning Covenants only; and the Reason that it doth not extend to the 1st of Eliz. is, because the 18th of Eliz. begins with inferior Ecclesiastical Persons, and therefore cannot include Bishops.

## Termino Sancti Michaelis, Anno 25 Car. II.

### In Banco Regis.

Anonymus.

**P**ayment is no good Plea to a Scire facias upon a Judgment; But in a Scire facias against the Bail, Hale laid, he might plead, That the Principal paid the Money.

Hinchman *versus* Hles.

**I**n a Replevin the Defendant avowed for Rent, upon a Lease made to the Plaintiff at Will. 2 Lev. 88. 1  
Raym. 224.

The Plaintiff replies, That the Defendant, before the Distress taken, made a Lease for Years, by virtue of which the Lessee entred. 3 Keb. 166,  
207.

The Defendant rejoins, and confesses the making of the Lease; but says, That there was a special Agreement that the Lessee should not enter until a time after; and traverses the Entry.

The Plaintiff surrejoins, and traverses the Agreement. To which the Defendant demurs specially.

Hale. There are here two things considerable.

First, Whether the making of the Lease be a determination of the Will before Entry.

Secondly, Whether there may be a Traverse upon a Traverse in this Case?

As to the first: If the Lessor does any Act inconsistent with the Continuance of the Estate at Will, it shall determine it from such time as the Tenant at Will takes notice of it; tho' this may prove a mischievous Case, in regard of the frequency of Conveyancing by Lease



40 E. 3. 16.  
 simile in  
 Case de  
 Waffe.

Lease and Release. An Outlawry of the Lessor shall not determine the Will until a Seizure, nor an Extent upon him until the Liberate. If the Lessor says, The Lessee shall hold it no longer; the Lessee (as soon as he knows of the Words) may take advantage of them as a Determination of the Will. As where he in Reversion upon a Lease grants the Reversion, and brings Debt for the Rent, the Lessee, tho' before Attornment, may plead in Bar, that he hath granted away the Reversion: But this Plea will amount to an Attornment.

As to the second Point, Where a Traverse is not good without a Special Inducement, there a Traverse may be to that Inducement: As in Trespass, where the Justification is local by virtue of his Office, or the like, and in Hobart in Digby and Fitzherbert's Case.

If the Lease were by Parol, here the collateral Agreement might be material. As if a Lease were made at Midsummer for 21 Years, and it were agreed, That the Lessee should enter but at Michaelmas, it would begin in point of Computation at Midsummer; but in point of Interest, not till Michaelmas.

Anonymous.

Ante 237,  
 239.

**I**N a Suit for Tithes, the Defendant pleaded in the Spiritual Court, That the Tithes belonged to another, who was Rector, and not to the Plaintiff. Which Plea being refused, and Damages thereof made in this Court, a Prohibition was granted.

Anonymous.

Cr. Car. 325.

**I**N an Action upon the Case for stopping of his Lights, the Plaintiff declared, That he was possessed for divers Years (and did not say how many) and that time out of mind the Light came in at the Windows, Which was allowed a good form of alleging the Prescription.

Anonymous.

Vide Postea  
 332.

2 Sid. 223.

1. 261.

**I**N an Ejectment, the Lessor of the Plaintiff had a Title to enter for a Condition broken for Non-payment of Rent; Lease, Entry and Duffer was confessed, and the Court was moved, That in regard the Lessor having such a special Title, and no Estate until Entry, whether such an Entry should be supplied by the general Confession, or that there should be an actual Entry? And it was held, that it should be supplied by the general Confession.

But Hale said, If A. lets to B. and B. to C. to try the Title; the Confession of the Lease, Entry and Duffer, extends only to the Lease made to C. and not to that to B.

Anonymous.

Anonymus.

**I**N *Crespas* against divers, one dies pending the Action, and notwithstanding the *Venire* and *Distringas* mentions all, and the Verdict is against all: If this Matter be surmized before Judgment, so that the Judgment be against the Survivors, 'tis well enough. Ante 235.

Anonymus.

**E**rror to reverse a Judgment given in the Borough-Court of Shrewsbury, in an Action upon the Case, laid apud Villam Salopia in Warda Wallica ejusdem Villæ. The Error assigned was;

First, For that it appeared they awarded a *Capias*, which an Inferiour Court cannot do in an Action upon the Case. Ante 220. Vid. Stat. 2 Cro. 222. of 19 H. 7. tho' it was said to be usual for the Palace-Court to do it. *Vid. Yelv. 1.* But this was over-ruled; because the Defendant appeared, which aids Discontinuance of Process.

Secondly, For that the *Venire* was awarded de vicineto Wardæ. And it was urged, that a Jury ought not to come out of a Ward.

*Hale.* It hath been sometimes so held; but it has been since adjudged good. 2 Cro. 222.

Thirdly, That in London the Venue usually comes out of the Ward; but there the Custom makes it good; here the Ward is intended lesser than the *Wille*. As *Wylde* said a Case was not long since: A Perjury was laid apud Whitehall in Parochia Sanctæ Margaretæ Westm'. the Venue came out of the Parish, and held it to be ill; for Whitehall was intended to be a *Wille*, and less than the Parish.

*Wildman versus Norton.*

**I**n a *Replevin* the Defendant pleads in Bar Property to the Defendant, and not to the Plaintiff. Upon which it was demurred, as supposing it amounted to the General Issue, as in *Crespas* such a Plea doth. 2 Lev. 92. 3 Keb. 219, 232. 27 H. 8, 21.

*Hale.* This Matter may be pleaded in Abatement, or in Bar. The General Issue in *Replevin* is, *Non cepit*; and if the Issue be *Non cepit*, Property cannot be given in Evidence: But if the Defendant pleads Property in a Stranger, then 'tis proper to conclude in Abatement. But the difficulty in this case is, That the Defendant should regularly have claimed Property in the Country, and then the Sheriff could not have delivered them, but the Plaintiff must have brought his *Writ de proprietat' proband'*: But this Plea serves as an Abowry, and the Defendant shall have a Return. Ante 127. 39 H. 6. 35.

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Note,



Note, It was said, That if any one distrains for a Rent, and before the Abowry, the Estate upon which 'tis reserved determines; the Abowry shall be as if the Estate had continued; for the Abowant is to have the Rent notwithstanding. But if the Distress were for a Personal Service, then the Defendant must have a Special Justification; for he cannot have that Service in specie when the Estate is determined.

The Case of Captain C.

A Captain of a Company in Colonel Russel's Regiment of Foot-Guards, and a Serjeant of his Company, were brought into Court upon the Prosecution of the Sheriffs and other Citizens of London; and the Offence alledged and moved against them was this: That one Danbert, a Butcher and Freeman of London, (who had broke) having listed himself a Soldier in this Company, and being afterwards arrested in London for Debt, and laid in the Compter; and thereof he having given the Captain private Notice, the following Design was resolved upon and executed for his Rescue, (viz.) There being a Privilege belonging to the Freeman of London, that they may by a Customary Precept or Warrant, (called a Duci facias, but by the Common People called a Horse) remove themselves from any other Prison (where they are) in London, to Ludgate, where it seems they have better Accommodation, (there being Maintenance allowed to the Prisoners of that Place.) such an one Danbert got, and gave Notice to the Captain, at what time he should be carried from the Compter to Ludgate thereby. Before this time the Captain commanded this Serjeant to take twenty or thirty Soldiers with him, and waylay the Prisoner, and rescue him from the Bailiffs and Officers of the Compter, as they were bringing him along. Accordingly the Serjeant and Soldiers went, and lay in or near an Alehouse about Popes-head Alley in Ambuscade, till the Prisoner should be brought by: And when they had Notice from one, (whom they had placed as Centinel) that he was coming, they sallied out and drew their Swords; (for the Serjeant had given them order so to do, and if any Opposition were made they should kill the first Man:) And by this means they rescued him and carried him away.

Hereupon Complaint being made to the Captain: He answered, That his Soldiers had done well, and he would justify it.

The Court asked him, what he had to say in his Justification?

He said, That he did not know the Law; but he ever thought that a Soldier could not be arrested without leave of his Officer; and that there was an Agreement to that purpose, between the late Lord General and the former Lord Chief Justice, and that he  
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knew one that had done the like thing, and nothing was said to him for it.

Hale Chief Justice, (to whom the rest agreed) said, The more wrong has been done. It seems you are grown very headstrong; but you ought to know, that every Officer and Soldier is as liable to be arrested as a Tradesman or any other Person whatsoever; and you ought to give full Obedience to the King's Commands, signified by his Writs of Process.

Wylde said, That that may be served upon you, when you are in the Head of your Company.

Hale said further. You are the King's Servants, and intended for his Defence against his Enemies, and to preserve the Peace of the Kingdom; not to exempt your self from the Authority of the Laws. And indeed it were a vain thing to talk of Courts and Laws, if military Men shall thus give the Law, and controul Proceedings; And for that Agreement you speak of, I know nothing of it; and if there were any such thing, it could be nothing but a Civility. Whatever you military Men think, you shall find that you are under the civil Jurisdiction, and you but gnaw a File, you will break your Teeth ere you shall prevail against it. This is an outrageous Offence, and the Punishment has formerly gone high. Men have heretofore lost their heads for Matters of such nature; and one of the Crimes of the late London Apprentices was the breaking of Prisons, and delivering of Prisoners; for which they had Judgment of High Treason by the Advice of all the Judges. The Captain and Serjeant were committed to Newgate: and being brought up at another time, Hale asked, Why an Information against these Persons was not exhibited? And told the City-Counsel, that if the Sheriffs did not prosecute this business, they (the Court) would prosecute them; for this was a matter of great Example, and ought not to be smothered: And further said, If that Men will take upon them to rescue all Soldiers that are committed, it may be within the reach of High Treason; because of the Universality of the Design against the King's Authority: But this being but for one particular, it cannot be Treason; but 'tis a rank Misdemeanour. And he ordered, That as many of the rest of the Soldiers should be prosecuted as their Names could be learned. There must be one more to make a Riot, tho' however 'tis a Misdemeanour.

Wylde said, Tho' they cannot find out another Name; yet if it be set forth, and made out that there were others, 'tis enough to make a Riot.



Termino Sancti Hillarii, Anno 25 & 26 Car. II.  
In Banco Regis.

**N**Ote, When a Prohibition is moved for, that a Copy of the Libel is denied to be delivered, the Court requires that Oath should be made of the Denial, and the Prohibition is but quousque a Copy be delivered.

Anonymus.

Postea 322.

**A**N Indebitat' Assumpsit was brought for Money lent. The Defendant pleads a Tender, which being offered at first, before Action brought, and acknowledged by the Plaintiff, he can never recover any Costs.

The Plaintiff replies, That before the Tender, he brought an Assumpsit in the Sheriff's Court, upon a Plaint upon the same Cause of Action, which was removed hither.

The Defendant rejoins, That upon that Plaint he declared for a greater Sum.

To which the Plaintiff demurred: For tho' there be a Variance in the Sum; yet it might be averred to be the same Cause of Action. And so the Court agreed.

And Hale put this Case: A. in Consideration that B. would marry his Daughter promised to pay 100 l. and in an Action brought, the Plaintiff was barred; and in another Action brought, The Promise was laid to pay the 100 l. at Request, and held it could not be averred to be the same.

Anonymus.

Raym. 231.  
2 Cro. 12,  
19, 29.

**N**Ote, Where Error is assigned in a Matter contrary to the Record, in nullo est erratum is a Demurrer. So where Matter of Fact is insufficiently alledged.

But if a Matter of Law and a Matter of Fact together (well set forth) be assigned (which ought not to be) there in nullo est erratum will be a Confession of the Matter of Fact, and not serve as a Demurrer for the Doubtfulness: Wherefore, in that case the Defendant must demurr.

Anonymus.

**O**ne having Rent payable Half yearly for a Term, whereof about six years were to come, was content to release it upon a Bond entered into to him, conditioned for the payment of the like Sum with the Rent, and at the same times. And in Debt upon the Bond after  
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failure of Payment, upon a Reference to the Secondary to state what was really due, he asked the Opinion of the Court, Whether there should be any deduction for Taxes? And the Court said, It was equitable that they should be allowed, in regard the Money in the Condition was intended between the Parties to be but in lieu of the Rent, which should have been chargeable with that Assessment.

Anonymus.

**I**n an Action upon the Statute of the 13th of this King, which imposes 6 s. and 8 d. Penalty upon any one that shall print another's Copy, whereof he hath made due Entry in the Register-Book of the Company of Stationers, without Licence of the Proprietor; it was set forth, That the Defendant had printed one thousand parts of a Book, called The Young Clerk's Guide, after that the Plaintiff had made an Entry thereof in the Register-Book of the Company of Stationers. After a Verdict for the Plaintiff, as to one Book, which was all the Plaintiff could prove printed since the late Act of General Pardon;

It was moved in Arrest of Judgment, That the Plaintiff did not shew himself to be Proprietor of the Book before he made the Entry. Sed non allocatur: For the Statute gives the Action to him that has made an Entry in the Register-Book.

Secondly, It was objected, That the Plaintiff ought to have no Costs in this Action. But for that the Court said, The Plaintiff might release them. But it was to be considered whether the Costs were well given or no?

Hedgeborrow *versus* Rosenden.

**I**n Debt for 100 l. the Plaintiff declared upon Articles of Agreement, purporting that the Plaintiff and Defendant should run an Horse for 100 l. and if the Defendant lost, that he should pay the 100 l. &c. 2 Lev. 94.  
3 Keb. 254,  
259.

The Defendant pleaded the Statute of this King, concerning Gaming, which provides that all Securities given for Money lost at Play, exceeding 100 l. shall be void. And sets forth, That in the Articles it was further agreed, That the Plaintiff and Defendant should run two, three or four Heats more at 20 l. a Heat, if the Plaintiff required it; so that the whole amounted to more than 100 l. 2 Mod. 54.

Holt argued for the Plaintiff.

First, The Statute (as appears by the words) intended to avoid Securities given for Money lost at Play; but not where the Contract is precedent: For tho' Men, when they have lost their Money, are very rash in venturing further; yet what is done before they enter



enter into play may be supposed to be done considerably : Sed non allocatur ; For that Construcion would wholly elude the Statute, and let Men loose to play for any great Sum, provided they secured it before-hand.

Secondly, It was objected, That the Statute did not intend to avoid the Security, when there was but 100 l. lost at a time, and it does not appear here that the Plaintiff requested the Defendant to play any further : Sed non allocatur ; For the Bargain being to play for more than 100 l. 'tis void ab initio ; and tho' the Plaintiff did not request the Defendant, 'tis not material no more than if one should contract for more Interest than the Statute allows, if the Creditor request it, tho' he never request it, yet 'tis within the Statute of Usury ; and the Court said, They would extend this Statute as largely as might be in suppressing of Gaming, which was so mischievous.

Monſieur Bellew, Norman Senior and Norman Junior.

2 Lev. 98.  
Raym. 234.  
3 Kcb. 278.

**T**hree Frenchmen were indicted of Treason, in Coining and Clipping the King's Money, by two several Indictments ; and the Court doubted, Whether Judgment for the Clipping should be drawing, hanging and quartering, or drawing and hanging only ; and having advised with all the Judges at Serjeants-Inn, they resolved, It should be drawing and hanging only, tho' the Precedents are both ways. And the Opinion of Coke 3 Inst. 17. is, that a Clipper should be drawn, hanged and quartered. But in regard the Statute of 3 H. 5. declared Clipping and Diminishing the King's Coin to be within the Statute of the 25 E. 3. which mentions Coining only, that does not stand repealed by 1 Mar. that leaves all Treasons within the Statute of the 25 E. 3. as they were before, and so 1 Eliz. against Coining makes not a new Treason. And then, as Hale said, Coining was esteemed as an inferiour sort of Treason, in comparison of such as concerned the King's Person ; wherefore, there was drawing and hanging only for that, and then by the same reason for Clipping, which seems a less degree of the same kind of Treason.

Then there was a debate, Whether Twisden being the antient Judge, or the Chief Justice, should pronounce the Judgment ?

Twisden said, In case of Treason it belonged to the Chief Justice, tho' not in Felonies ; and that the Lord Foster did it in Sir Henry Vane's Case, in the 13 of this King.

Hale thought the other was to do it ; and therefore Twisden gave the Judgment, ut supra ; and to avoid scruple, Hale pronounced it over again.

*Baker versus Bulstrode.*

**I**N Debt upon a Bond, conditioned to perform an Award; the Question did arise upon one part of the Award, (viz.) That the Defendant should seal and execute such a Release to the Plaintiff, as should be to the satisfaction of the Plaintiff's Counsel, within the space of seven days, and which of the Parties was to tender the Release was the question. And it was resolved, that the Tender ought to come on the Defendant's side, and not like the Case where such Deed, &c. is to be made, as the Counsel for the other Party shall advise; for the Deed must be offered according as the Counsel does advise, and he to whom 'tis to be made is to do the first Act; but the words here are of another import. vid. Lamb's Case, 5 Co. 13, 23.

<sup>2</sup> Lev. 95.  
Raym. 232.  
<sup>3</sup> Keb. 232,  
257.  
<sup>1</sup> Mod. 104.

It was held by the Court, That a Writ of Error that bears Teste before the Judgment given, is good to remove the Record, so as Judgment be given before the Return of it: And Hale said, That about three years since at Norfolk Assizes, the Defendant in an Indictment of Barretery brought a Writ of Error Teste before the Assizes; and it was disallowed, because if such Practice should obtain, it would disappoint all the Proceedings at the Assizes. And if the Plaintiff does not shew his Writ of Error to the other Party, or get it allowed by the Clerk, by endorsing a Recepi upon it within four days, (which time the Court gives, as convenient time for putting in of Bail according to the Statute) the Writ of Error is no Superfedeas. Also, if before the Writ of Error the Sheriff returns a Fieri feci, and non inveni emptores, the Execution is not to be undone.

<sup>1</sup> Mod. 112,  
<sup>3</sup> Keb. 294.

<sup>1</sup> Mod. 112.



Termino Paschæ, Anno 26 Car. II.

In Banco Regis.

Anonymus.

2 Lev. 102.  
3 Keb. 283,  
292, 303,  
335.

**I**N an Assault and Battery, the Case upon the Evidence was this. The Defendant drew a Sword, and waved it in a menacing manner against the Plaintiff, but did not touch him, so the Jury were ordered to find him Guilty as to the Assault, but not of the Battery. And the Opinion of the Court was, That the Plaintiff was to have no more Costs than Damages; for the new Act excepts Actions of Assault and Battery, so that both must be proved.

Anonymus.

1 Mod. Rep.  
112.  
3 Keb. 301.

**I**F a Parish, &c. be indicted for not repairing of a Way within their Precinct, they cannot plead Not guilty, and give in Evidence that another by Prescription or Tenure ought to repair it; for they are chargeable de communi Jure, and if they would discharge themselves by laying it elsewhere, it must be pleaded.

Error.

Ante 196.  
1 Mod. 96.  
1 Lev. 102.  
3 Keb. 301.

**E**RROr to reverse a Judgment in Debt upon a Bond, given in Norwich Court, where by the Custom, the plea of the Defendant was, quod non dedicit factum, sed petit quod inquiretur de debito.

First, It was moved to be Error, for that the Venire was XII Men, &c. in figures; Sed non allocatur; for being in these letters XII. and not in the figures 12. it was well enough.

Secondly, It was ad triandum exitum; whereas there was no Issue joined, wherefore it ought to have been ad inquirend' de debito, &c. Sed non allocatur; for the Precedents are as the Case is here.

Thirdly, The Condition of the Bond was to pay at Aldborough, and that ought to have been shewn to be within the Jurisdiction of the Court; Sed non allocatur; for the Plea here is not Payment, secund' formam Conditionis, but the Jury is to inquire by the Custom of all manner of Payments and Discharges.

Fourthly, In the Record it was continued over to several Courts, and in the Court where the Judgment is given, 'tis said in Curia prædicta, and so incertain which; but notwithstanding these matters, the Judgment was affirmed.

Anonymus.

Anonymus.

**T**he Case upon Evidence at a trial in Ejectment was this, A Dean and Chapter having a Right to certain Land, but being out of Possession, sealed a Lease with a Letter of Attorney, to deliver it upon the Land, which was done accordingly, and held to be a good Lease; for tho' the putting the Seal of a Corporation Aggregate to a Deed, carries with it a Delivery; yet the Letter of Attorney to deliver it upon the Land, shall suspend the Operation of it while then.

Tenant for Life being in Debt, to defraud his Creditors, commits a Forfeiture, to the end that he in Reversion may enter, who is made privy to the Contrivance. The Opinion of Hale was, That the Creditors should avoid this, as well as any fraudulent Conveyance.

Anonymus.

**I**n an Ejectment upon a Trial at Bar for Lands in ancient Demesne, there was shewn a Recovery in the Court of ancient Demesne, to cut off an Entail which had been suffered a long time since, and the Possession had gone accordingly. But there was now objected against it,

First, That no sufficient Evidence of it appeared, because the Recovery it self, nor a Copy of it was shewn; for in truth it was lost. But the Court did admit other proof of it to be sufficient; and said, If a Record be lost, it may be proved to a Jury by Testimony, as the Decree in H. 8 time for Withe in London is lost, yet it hath been often allowed that there was one.

Secondly, It appeared that part of the Land was leased for Life, and the Recovery with a single Voucher was suffered by him in Reversion, and so no Tenant to the Præcipe for those Lands: But in regard the Possession had followed it for so long a time, the Court said they would presume a Surrender, as in an Appropriation of great Antiquity, there has been presumed a Licence tho' none appeared.

Thirdly, It was objected, That the Tenant in Tail which suffered the Recovery having first accepted of a Fine sur Conuſance de droit come ceo, his Estate Tail was changed, for he was estopped during his Life, to say that he had any other Estate than Fee; then he being made Tenant to the Præcipe, the Recovery was not of the Estate Tail, and so should not bind. But the Court held clearly, That the Acceptance of this Fine made no Alteration of his Estate. If Tenant for Life accepts such a Fine, 'tis a Forfeiture, because

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1 Mod. R.  
117.  
3 Keb. 319.

T. Jones 64.



he admits the Reversion to be in a Stranger, but it does not change his Estate; so where two Joint-tenants in Fee accept a Fine, which is to the Heirs of one of them, yet they continue Joint-tenants in Fee as they were before.

Fourthly, The Writ of Right Close did express the Land to lie in such a Manor; and a Præcipe that demands Lands ought to mention the Vill in which they lie, for a Præcipe of Land in Parochia or in Manerio is not good. But this Exception was disallowed by the Court, for Hale said the Writ of Right Close is directed Balivis Manerii, &c. quod plenum rectum teneant of the Land with in the Precinct of the Manor, and it is not to be resembled to another Præcipe. But if a Præcipe be faulty in that Point, unless Exception be taken to it in Abatement it cannot be assigned for Error; but if it were erroneous, the Recovery would bind until reversed.

Note, After Judgment quod computet, tho' it be not the final Judgment; yet no motion is to be admitted in Arrest of Judgment, and after such Judgment a Scire facias lies against the Executor of the Defendant.

1 Sid. 151.  
1 Mod. 35.

Note, In an Action of Debt against the Lessee he may plead nil debet, and give the Expulsion in Evidence.

Anonymous.

2 Lev. 198.  
2 Keb. 155.

In an Assumpsit the Consideration appeared to be, That the Defendant promised to pay a Sum of Money which he owed; This is no good Consideration though after a Verdict, unless it appeared, that the Debt was become remediless by the Statute of Limitations; but payment of a Debt without Suit is a good Consideration.

Anonymous.

A Justice of the Peace brought an Action of Slander, for that the Defendant said, He was not worth a Groat, and that he was gone to the Dogs. And upon a motion in Arrest of Judgment, notwithstanding that it was urged to maintain it, that the Statute of H. 6. requires that a Justice of Peace shall have 40 l. a Year; And therefore, in regard an Estate was necessary to his Office, that the Action would lie; yet the Judgment was stayed, for such Words will not bear an Action, unless the Person of whom they are spoken, lives by buying and selling.

Anonymous.

Anonymus.

**I**T was returned upon Elegit, That the Sheriff had deliver'd me-  
 jicratem Terrar' & Tenementorum in extent; and after the fi-  
 ling and Entry of it upon the Record the Plaintiff moved to quash  
 it because it was insufficient; for the Sheriff ought upon such Exe-  
 cution to deliver the Possession by Metes and Bounds.

Wylde held, That it being entred upon the Record, there was no  
 avoiding of it but by Writ of Error. But Hale held, That in re-  
 gard it appeared by the Record to be void, it might be quashed;  
 as if upon an Ejectment to recover Possession, and upon such a Re-  
 turn it appears upon the Evidence that there was more than the  
 half of the Land delivered, this shall be avoided. So if a Fieri  
 facias be not warranted by the Judgment upon which it is awarded,  
 tho' the Sheriff shall be excused, yet 'tis meerly void as to the Par-  
 ty. Et adjournatur.

1 Roll. 305.

1 Sid. 91,

239.

Norton *versus* Harvey.

**T**he Case was, An Executor being possessed of a Term, let part  
 of it, reserving a Rent and died. And the Question was,  
 Whether his Executor should have the Rent or the Administrator de  
 bonis non?

2 Lev. 100.

3 Keb. 298,

427, 463,

495, 549.

Postea Drue

and Bailly,

275.

It was argued for the Executor, That this Rent is meerly due by  
 the Contract, and not incident to the Reversion, and the Admi-  
 nistrator is in Paramount, it being now as if the Testator had di-  
 ed intestate; and therefore, before the Statute of this King, such  
 Administrators could not have had a Scire facias upon a Judgment  
 obtained by the Executor; though in the Case of Cleve and Vere,  
 3 Cro. 450, 457. 'tis held, That he may have a Liberate where the  
 Executor had proceeded in the Execution of a Statute, so far as an  
 Extent, for there the thing is executed, and not meerly Executor  
 as a Judgment. If a Man that hath a Term in the right of his  
 Wife, lets part of it, reserving a Rent, the Wife surviving shall not  
 have the Rent: On the other side it was said, That this Case dif-  
 fered from that, because the Reservation here is by him, that had  
 the whole Right-executed in him.

Another objection against the Action was, That here in the Decla-  
 ration, being in Covenant for Non-payment of Rent, there is not  
 any Demand alledged. But that was answered, because the Co-  
 venant was to pay such a Sum for the Rent expressly; but if the  
 Condition of a Bond be for performance of Covenants expressed  
 in such a Lease, one of which is for payment of Rent, in that Case  
 the Bond will not be forfeit without a Demand; and of that  
 Opinion were the Court, and that the Executor shou'd have

Cr. Car. 76,

77.

1 Roll, 460.



the Rent, but when recovered, Hale said, it should be Assets in his Hands. And accordingly Judgment was given for the Plaintiff. Postea 275.

Termino Sanctæ Trinitatis, Anno 26 Car. II.

In Banco Regis.

*Silly versus Silly.*

3 Keb. 319,  
348.

**D**ower of 300 Acres of Land, 200 Acres of Pasture, 100 Acres of Meadow. The Tenant pleaded Non-tenure.

The Jury found him Tenant as to 320 Acres of Land, and as to the rest that he was not Tenant: And the Judgment was, that the Demandant should recover Dower out of the 320 Acres.

Error was assigned in this Court, That the Verdict and Judgment were for more Acres of Land than were demanded. But on the other side it was said, Land was a general Word, and might include Meadow and Pasture.

Postea 262.

Curia, In a Grant, Land will extend to Meadow, Pasture, &c. but in Pleading it signifies Arable only, and here in regard they are distinguished in the Count, the Verdict and Judgment must be reversed for the whole. Tho' Hale said, Antiently such Judgment would have been reversed but for the Surplusage. Vid. Post. 262.

*Batmore & Uxor' versus Graves.*

2 Lev. 107.  
3 Keb. 263,  
329.  
1 Mod. 102,  
120.

**T**Rover for 100 Loads of Wood, upon a Special Verdict the Case was this, Copyhold Land was surrendered to the Use of J. S. for Years, Remainder to the Brother of the Plaintiff's Wife, who died before the Term expired, and so was not admitted any otherwise, than by the admission of the Tenant for Years. And it was resolved,

1 Mod. 102,  
120.

First, That the admittance of him, that had the Estate for Years, was an admittance for him in the Remainder, 4 Cro. 23. a. 3 Cro. 504. Fine sur Grant and render to A. for Life, Remainder to B. Execution sued by A. serves for B. So an Attornment to Tenant for Life serves for him in Remainder, and this brings no prejudice to the Lord; for a Fine is not due until after admittance; and the Lord may assess one Fine for the particular Estate, and another Fine for the Remainder. But Wyld said, He need not pay it until his Estate comes in Possession; after a Surrender the Estate re-

mains

mains in the Surrender of before admittance of the Cestuy que use; yet where Borough English Land was surrendered to the Use of J. S. and his Heirs, and he died before Admittance, it was held, That the younger Son should have it.

1 R. 98. a.  
1 Mod. 102.  
2 Sid. 61.  
Style 146.  
1 Mod. 120.

Secondly, It was resolved, That the Possession of the Tenant for Years was so the Possession of him in Remainder, as to make a Possessio Fractis. But then it was moved, That the Conversion was laid after the Marriage, and so the Feme ought not to have joined with her Husband in the Action. But the Court held, That in regard the Trover was laid to be before the Marriage, which was the Inception of the Cause of Action, the Wife might be joined; as if one has the Custody of a Woman's Goods, and afterward marries her, she may join in Detinue with her Husband; for in case of Bailment the Proprietor is to some purposes in Possession, and to some out of Possession. Hale said, In this Case the Husband might bring the Action alone, or jointly with his Wife; and so Judgment was given for the Plaintiff.

Yelv. 165.  
166.  
1 Sid. 172.

Anonymus.

**I**n Debt upon a Bond, the Condition was to save the Obligee harmless from another Bond.

The Defendant pleaded, Non damnificatus.

The Plaintiff replies, That the Money was not paid at the day, and he devenit onerabilis, and could not attend his Business for fear of an Arrest.

The Defendant rejoins, That he tendered the Money at the day, absque hoc, that the Plaintiff devenit onerabilis; to which it was demurred, and the Judgment was given for the Plaintiff, for the Money not being paid at the Day, the Counter-Bond is forfeited, 5 Co. 24. and the Traverse in this Case is naught.

Vid. Cro 1.  
672.

The Mayor and Commonalty of London *versus* Dupester.

**I**n Debt for a Duty, accruing to the City for Timber imported, called Scavage. The Declaration was, That they were and had been a Corporation time out of mind, and their Customs were confirmed by Act of Parliament, Temps R. 2. &c.

2 Lev. 108.  
3 Keb. 337,  
491.

The Defendant tendered his Law, and Co. Entries 118. was cited; where in Debt for an Amerciament in a Court Baron, though the imposing of it was grounded upon a Prescription, yet Wager of Law was admitted. But notwithstanding, in this Case the Court over-ruled the Wager of Law; for here the Duty it self is by Prescription, and that confirmed by Act of Parliament: Debt for a Duty growing by a By-law, if the By-law be authorized by Letters Patents, no Wager of Law lies: So in Debt for Toll granted by Letters Patents. 20 H. 7.

1 Mod. 121.

Termino



Termino Sancti Michaelis, Anno 26 Car. II.

In Banco Regis.

Silly *versus* Silly.

Ante 260.

**T**he Case was moved again; and the Court said, That the Demandant might have taken Judgment for the 300 Acres only, habito nullo respectu to the rest, and released all the Damages: But this was not proper for an Amendment, the Mistake being in the Verdict; but if it could have been amended in the Common Bench, the Court might here have made such Amendment. Ante 260.

Burfoot *versus* Peal.

Postea 247.

**A** Scire facias was brought against the Bail, who pleaded, That the Principal paid the Debt ante diem impetrationis Brevis. Upon which it was demurred.

Jones, Solicitor, for the Defendant, said, Though the Bail may plead payment, because the Condition of the Recognizance is in the Disjunctive, (viz.) for rendering the Body, or paying the Money, yet the Principal cannot. Also it ought to have been pleaded, to be paid before a Capias ad satisfaciendum taken out; for as it is, it may be after the Recognizance forfeited: As if the Death of the Principal be pleaded, it must be alledged to be before the Capias ad satisfaciendum taken out.

But the Court held it to be well enough: For if that matter be material, 'tis to come on the other side, and ex gratia Curiae the Bail has time to save himself before the Return of the second Scire facias.

Anonymus.

**I**n an Assumpsit the Plaintiff declared, That on the 28th of June (Discourting with the Defendant about the Marriage of his Daughter) the Defendant promises him, That if he would hasten the Marriage, and should have a Son within twelve months then next following, he would give him an hundred Pounds: And sets forth, That he did marry soon after, and had a Son within twelve months after the Marriage.

Upon non Assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff had not set forth, that he had a Son within the time, for then next following

shall be referred to the Day of the Discourse, and not to the Marriage.

But the Court were of another Opinion, and gave Judgment for the Plaintiff.

*Crawfoot versus Dale.*

**I**n an Action for Words, it was thus: There being a Discourse of the Plaintiff's Trade, the Defendant said, He was a cheating Knave, and kept a false Debt-Book, with which he cheated the Country.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That to say a Tradesman was a Cheating Knave, tho' there were a Colloquium of his Trade, was not actionable; for that might be said, because he sold too dear, and so cheated in the Price; but to say, that he sold bad Commodities, is actionable; and to say, he kept a false Book, will not bear an Action, for that may be unwittingly. 1 Saund. 307.

But the Court resolved, That the Words laid together were actionable; for Tradesmens Books are of much regard, and sometimes given in Evidence.

*Jennings versus Hunking.*

**I**n an Action for saying, he was Perjured, the Declaration was laid in Devonshire. 2 Lev. 121.  
3 Keb. 350,  
372, 509.

The Defendant justified, for that the Plaintiff made a false Affidavit at Launceston in Cornwall, and Issue was taken upon that, and tried at the Assizes in Devonshire, and moved that this was a Nil-trial.

But it was answered, That the Statute of 16 Car. 2. cap. 8. helps all Nil-trials, so as the Trial be in the County where the Action is brought. And a Case was cited in this Court between Crosse and Winton in the 21 Car. 2. where an Action was brought for saying, he stole Plate from Wadham College in Oxford. The Defendant justified, That he did steal there. Upon which there was Issue joined, and tried in London, where the Action was brought, and it was held good. And this Term a Case was moved in the Common Bench in a Writ of Covenant against Wise: The Defendant pleaded a Feoffment of Lands in Oxfordshire, and the Issue was non feoffavit, and afterwards tried in London, where the Action was laid; and the Opinion of the Court there was, that the late Statute would help it. Ante 22.

The Court said, It was within the Words of the Act, but (as they conceived) not within the Meaning; for they intended only, so the Trial was in the County where the Issue did arise. But in regard of the Resolutions before, they would not stay Judgment. 1 Saund. 246;  
249.

Anonymus:



Anonymus.

**I**N an Action upon the Case the Plaintiff sets forth, That the Defendant malitiose crimen Feloniæ ei imposuit, and not mentioned any Felony in particular; and yet held to be well enough.

Anonymus.

**T**RESPASS with a Continuando, which was alledged for some time after the Term wherein the Action was brought, and Damages given to 10l.

It was moved in Arrest of Judgment, That for part of the Trespass it appears by the Plaintiff's own shewing, That the Action was brought before the Plaintiff had Cause of Action; and it was said, That if the Bill were filed at the end of the Term, and the Trespass reached to some time within the Term, the Filing should not relate so as to make it Insufficient: But here it was carried to the 3d of July, which the Court must see is out of the Term, because they take Cognizance of the beginning and end of every Term.

Anonymus.

**I**F an Audita Querela be brought before the Execution of a Judgment quia timer, and it goes for the Defendant, he shall execute his Principal Judgment: But if it be brought after the Party is in Execution, and he be bailed out, then the Judgment being once executed, there can be no after Resort to that, but the Defendant shall proceed upon the Record of the Audita Querela.

1 Sid. 14.

Fawkener *versus* Annis.

3 Keb. 352.

**T**he Privilege of the Chancery was pleaded by way of Prescription, and upon a Demurrer it was held naught.

First, Because it was not concluded, & hoc paratus est verificare: And

Secondly, No place alledged; for they are Matters of Fact, and triable.

Anonymus.

**I**N an Action upon the Case the Plaintiff declared, That the Defendants (the Tenants and Occupiers of such a parcel of Land adjoining to the Plaintiff's) have time out of mind maintained such a Fence; and that from the 23d of April to the 25th of May, & Postea, the Fence lay open, and that una Equa of the Plaintiff's went through the Gap, and fell into a Ditch the 28th

of May, & submersa fuit. Upon Not Guilty pleaded, and found for the Plaintiff, Holt moved in Arrest of Judgment;

First, That the Prescription is laid in Occupiers, and not shewn their Estate; and that hath been adjudged naught in the 1 Cro. 445. and the 2 Cro. 665.

Curia. 'Tis true, there have been Opinions both ways; but 'tis good thus laid; for the Plaintiff is a Stranger and presumed ignorant of the Estate: But otherwise it is if the Defendant had prescribed. Postea 274.  
275.

Secondly, It was objected, That the Cause of Action is laid after the 25th of May, and (for ought appears) the Fence might be good at that time, tho' 'tis said to be open till the 25th of May & postea. Sed non allocatur: For,

1. 'Tis after Verdict.

2. 'Tis said expressly, that the Beast was lost in defectu fensuram, and so cannot be intended but that it was down at the time.

Anonymus.

**A**n Indictment of Forceible Entry upon the 8 H. 6. being removed hither by Certiorari a Restitution was prayed: But to stop that, it was said, That the Indictment was traversed; and a Plea, that the Party had had three years quiet possession, according to the 31st of Eliz. and though Dyer 122 is, That 'tis in the Discretion of the Court to grant Restitution even after a Traverse put in; yet now since the Statute of Eliz. where such Plea is tendered, the Court cannot grant a Restitution, tho' they would in this Case, if by Law they might; for the Party that made this Entry had lost the Land just before by Verdict in an Ejectment, and by this means the Effect of it should be disappointed. Raym. 85.

Note, The Indictment wanted Vi & armis; for it was pacifice intravit & sine Judicio disseisivit, & a possessione expulit & amovit.

But on the other side it was said,

First, That the Entry being pacifice, it was not the course to lay it Vi & armis.

Secondly, That 37 H. 8. c. 8. supplied the defect of Vi & armis in an Indictment: But as to the latter the Court were of Opinion, That the Statute supplied only the lack of the words gladiis, baculis & cullellis, as are mentioned in the Statute, Vid. the Statute.

Anonymus.

**A** Suit for a Pension may be in the Ecclesiastical Court, tho' by Prescription; but if it be denied to be time out of mind, then a Prohibition is to go, so that the Prescription may be tried at Law, as a Modus decimandi, mutatis mutandis. 1 Lev. 128.  
Ante 3, 120.  
1 Mod. 218.  
Postea 274,  
335.



Kellw. 114.  
Cr. Car. 162.  
Contra. Yel.  
129.  
Raym. 425.

It was said by the Court, That two might join in a Prohibition, tho' the Gravamen was several; but they must sever in their Declarations upon the Attachment.

## Termino S. Hillarii Anno 26 & 27 Car. II.

### In Banco Regis.

Anonymus.

2 Lev. 120.  
3 Keb. 416.

**I**N Error, the Writ was Teste the 30th of November last, and returnable in Parliament the 13th of April next, the Day to which the Parliament was prorogued. The Defendants Counsel desired the Rule of the Court for the taking out of Execution, supposing this Writ of Error was no Superedeas: And alleged, that the late Rule made in the House of Lords did not extend to their Case; for that was, That all Causes there depending should not be discontinued by the intervening of a Prorogation; but this Case will not be there depending before the Return of the Writ. In 3 H. 7. 19. the Court of King's Bench would not allow a Writ of Error into the Parliament until some Error was shewn to them in the Record, lest it should be brought on purpose to delay Execution. In Bulstrode's Reports a Writ of Error returnable the second Return of the Term was held to be no Superedeas, because it seemed an affected delay that it was not made returnable the first Return.

Raym. 5.

Hale. It has been taken, that a Prorogation determined a Cause depending in Parliament by a Writ of Error; but the Lords have lately declared otherwise: But that comes not to this Case, the Writ not being returned. A Writ of Error returnable ad proximum Parliamentum is not good; but otherwise if they are summoned or prorogued to a Day certain. If the Day of the Session had been a Year hence, it would be hard that a Writ of Error should stay Execution; and the same Reason where the whole Term intervenes. A Writ of Error did bear Teste 10 Nov. and was returnable 1 Nov. proxime futur; and the Record was sent into the Exchequer Chamber and a Mittimus endorsed upon the Roll here: And it was resolved, That Execution might be taken out because of the long Return.

Ante 31,  
100.

1 Mod. 106.

Secondly, That tho' there were a Mittimus upon the Roll, yet the Record remained here until the Return of the Writ to all purposes.

And the Opinion of the Court was, That the Writ of Error <sup>Ante 31.</sup> was no Superedeas: But they would make no Rule in it, because they said it was not judicially before them; but the Party might take out Execution if he thought fit: And then if the other Side moved for a Superedeas, they should then resolve the Point.

Note, Hale said in an Assumpsit for Money upon the Sale of <sup>3 Cro. 22.</sup> Goods, That upon non Assumpsit the Defendant might give in Evidence an Eviction of the Goods to mitigate the Damages, as in all Assumpsits; tho' upon certain Contracts the Jury may give less Damages than the Debt amounts to, as he said was done in a Case where a man promised to give a Straw for every Nail in every Horse's Shoe, doubling every time; and they gave in Damage but to the Value of the Horse, tho' (as the Bargain was made) it would have come to above 100 l.

*Lomax versus Armorer.*

A Writ of Error was brought to reverse a Judgment in Dow- <sup>2 Lev. 98.</sup> er given in the Court of Newcastle. <sup>Raym. 233.</sup> The Error assigned was; because the Proceeding was by Plaint, <sup>3 Keb. 277,</sup> and no Special Custom certified to maintain it: As in London <sup>326, 421.</sup> and Oxford they have Assizes of Fresh Force by Plaint.

The Court held it to be erroneous for this Cause; but would not determine, whether it might not be good upon a Special Custom? 1 Rolle 793. Pl. 11.

*Anonymus.*

A Mandamus was granted to the Archdeacon of Norwich, to <sup>3 Keb. 277,</sup> swear a Churchwarden upon surmize of a Custom, That <sup>326, 421.</sup> the Parishioners are to choose the Churchwardens; and that the Archdeacon refused him, notwithstanding that he was elected according to the Custom.

The Archdeacon return'd, that non sibi constat that there is any such Custom (which Form is not allowable; for it ought to be positive, whereupon an Action might be grounded) and that by the Canon the Parson is to choose one, &c.

The Court said, That Custom would prevail against the Canon, and a Churchwarden is a Lay-Officer, and his Power enlarged by sundry Acts of Parliament, and that it has been resolved, That he may execute his Office before he is sworn, tho' it is convenient he should be sworn; and if the Plaintiff here were sworn by a Mandate from this Court, they advised him to take heed of disturbing him. Noy Rep. 139.

*Am 2*

*Anonymus*



Anonymus.

2 Lev. 122.  
3 Keb. 336,  
417.

**A**N Assumpsit was brought against an Executor; for that the Testator being indebted to the Plaintiff, he did ad requisitionem of the Defendant come to Account with him, upon which there appeared to be so much due to the Plaintiff, which he promised to pay.

After Verdict the Judgment was de bonis propriis, and it was moved that it ought to have been de bonis testatoris: For the Accounting with him is little more than telling him what is due, and this might make an Executor afraid of Reckoning with any of his Testator's Creditors.

The Court said, That the Accounting upon the Defendant's Request, (which was more than the Plaintiff was bound to have done) was a Consideration, and after a Verdict they must intend an express Promise.

But Hale said, That if upon the Evidence it had appeared that there was no Intention to alter the Nature of the Debt, (as in case, an Executor should say, Stay a while until the Testator's Estate was come in, and I will pay you,) he should direct the Jury to find against the Plaintiff that would in such case charge an Executor in his own Right.

Termino Paschæ, Anno 27 Car. II.

In Banco Regis.

Postea 293,  
311.

**N**Ote, In an Indebitatus Assumpsit a man promises in Consideration, that one (to whom the Promise was made) would marry his Kinswoman, he would give her 100 l. It was adjudged that an Indebitatus will not lie; for 'tis not a Debt, but a Collateral Promise.

Best versus Yates.

3 Keb. 449.

**I**N an Action upon the Case the Plaintiff declared, That the Defendant being a Taylor, he retained him to make him a Coat well and artificially, and that the Defendant maliciously intending to abuse and damage the Plaintiff made it ram inept, negligenter & artificialiter, that it became of no value or use to him, to his damage 20 l. To this Declaration the Defendant demurred;

First,

first, for that he says he retained him, and does not shew that he delivered him any Materials, so that the Action might lie for spoiling of them; but this amounts to no more than that he bespoke a Garment, which when it was made he did not like, and so might have refused it, therefore there does not appear to be any damage. Vid. The precedent in Aston's Entries fol. 12.

Secondly, he does not shew wherein he had spoiled the Coat, or what defect there was in it, and this ought to have been certainly set forth. And of this Opinion were the Court, and Judgment was given quod querens nil capiat per billam.

*James versus Peirce.*

**I**N an Action of Debt for an Escape, upon Nil debet, a Special Verdict was found to this effect, (viz.) That the Plaintiff recovered 700 l. Debt against J. S. who was thereupon committed in Execution to the Fleet, and afterwards the Warden permitted him to make a voluntary Escape, after which he returned again to the Fleet, and the Defendant was made Warden in the place of the other, and J. S. being then in the Fleet, was turned over with the other Prisoners, and afterwards suffered to escape. So that the question was, Whether he were so in Execution upon his return, as the Escape in the now Warden's time should intitle the Plaintiff to the Action? It was principally insisted on against the Action, that there being once an Escape, the Party could not be in Execution again without new Process.

Hale said formerly it was held, even in the Case of a Permissive Escape, that if the Party were taken again, he might discharge himself by Audita Querela, and that he might not be retaken unless in case of a voluntary Escape; but there the remedy was only against the Gaoler. But afterwards it was held, that Debt would lie against the Party who escaped, because the Duty they did not suppose was discharged by the Escape: But they held it was a good Plea to a Scire facias. But afterwards, 9 Car. between the Lord Roberts and Trevilian, the Opinion of the whole Court was, That a Scire facias quare Executionem habere non debet would lie against one that had made a voluntary Escape; and there is no reason, but that he may as well be taken by the Party again without a Scire facias, for the Party has an interest in the Body of the pledge, until his Debt is satisfied; Tho' if the Prisoner should bring Trespass against a Gaoler, that detained him after a voluntary Escape, he could not defend it; the mischief would be exceeding great if the Sheriff, &c. might at his pleasure put the Plaintiff to an Action only against himself. For this last Vacation, the Warden of the Fleet turned as many Prisoners at large, as their Debts came to 80000 l. and ran away himself: And so by the

Ante 4.  
3 Keb. 453,  
463.  
2 Lev. 132.

1 Roll. Abr.  
902. N. 8.  
Ante 4.  
2 Mod. 136.  
Ch. Just.  
Jones 21.  
1 Sid. 330.

*Dpi.*



Hob. 302.

Opinion of the whole Court (absente Twisden) Judgment was given for the Plaintiff. Vid. Hob. The Sheriff of Essex's Case, which was denied to be Law.

Sir Thomas Littleton's Case.

**D**Ebt was brought against him, by one that entituled himself by Assignment of Commissioners of Bankrupts. Upon the Evidence it appeared, That he with two others had covenanted with the King, to provide Victuals for the Seamen that served in the late Dutch War at 8 d. per Man; and after this they made a bargain with the Purasers of the Ships, to provide for such as served in their Ships, at other Rates agreed upon between them. The Victuallers afterwards falling into the King's displeasure, and being thereupon removed from their Employment, and having a great Sum of Money due from the King to them upon the Contract aforesaid, refused to pay the Purasers, supposing (notwithstanding their Contract) that they were no Debtors, (being upon the King's Account) until such time as their Accounts with the King were allowed; and so, was said, was the usage of the Navy-Board, whereupon a Commission of Bankrupt issued forth. But the Court, (viz.) Hale, Rainsford and Wylde, were clear of Opinion, That this Employment in buying up Stores for Victualling the Fleet did not make the Victuallers Traders, nor was it buying and selling within the Statute of Bankrupts. And Hale said, that every Purveyor might as well be made a Trader, or Schoolmaster that keeps Boarders in his House; and tho' it were shewn, to enforce the matter that where there was a Redundancy of Provisions, they used to victual Merchantmen; but in regard it was originally designed for the use of the Navy, in pursuance of their Contract with the King, they might well dispose of the Surplus to any other use: And then it was shewn, that they victualled the French Fleet also, and that was more than was contained in their first Agreement with the King; but that being proved to be done by the King's express Order (tho' that Order was not produced.) the Court held, That it was not sufficient Evidence to prove them Traders. But Hale said that they having made a Contract with the King to provide for the Fleet at so much a Head, the King was not chargeable to those with whom they contracted; and therefore that Contract with the Purasers of the Ships would make them Debtors to them. But upon the other matter, they directed the Jury to find for the Defendant.

Termine

Termino Sanctæ Trinitatis, Anno 27 Car. II.

In Banco Regis.

Motteram *versus* Jolly.

**I**N Debt upon a Bond conditioned to perform Covenants in an Indenture; one of which was, That the Defendant covenanted with the Plaintiff, that the Plaintiff should elect 20 of the best Trees out of his Wood, to be taken within 11 years: And the breach was assigned, that the Defendant had cut Trees within the time; upon which it was demurred, and relied upon Sir Thomas Palmer's Cases, 5 Co. where Sir T. P. sold 2000 Cords of Wood, to be taken at the Election of the Vendee. And there it is said, If the Vendor cuts the Wood before the Vendee hath elected, the Vendee cannot meddle with that which is cut, but must supply his bargain out of the residue: But here the Court were of Opinion for the Plaintiff, for by the Covenant he hath 11 years time to elect, and by cutting any Trees in the mean time, the Latitude of his Election is abridged. And Hale said, for the case in 5 Co. there if the Grantee can have the number of his Cords of Wood, he hath the effect of his Grant; But Trees differ in value exceedingly from each other.

3 Keb. 477,  
493.  
2 Lev. 148.

Bolton *versus* Cannon.

**I**N Debt against an Executor for Rent Arrear in his own time, in the debt & detinet.

3 Keb. 189,  
446.

The Defendant pleads, That the Rent is more worth than the Land, and that he tendered a Surrender before the time for which the Rent is demanded; and that the Plaintiff refused to accept the Surrender, and that he had fully administered, and so demands Judgment of the Action.

The Plaintiff replies, That there was Rent Arrear to him, and that therefore he was not bound to accept of the Surrender, and to this the Defendant demurs. The Court said,

First, That an Executor that does intermeddle cannot make a Lease, or any other part of the Testator's Estate, for he cannot assume the Executorship for part, and refuse for part.

1 Sid. 266.  
2 Ven. 209.  
Yel. 103.  
1 Mod. 185,  
186.

Secondly, That in case the Land be not more worth than the Rent, it is a good Plea to an Action of Debt in the debt & detinet, for he is to be charged in the detinet only; tho' where for Rent is of less value, he may be charged in the debt & detinet for that



that which is accrued in his own time, according to Hargrave's Case, 5 Co.

Thirdly, The doubt here is, That the Defendant having waived the material part of his Plea. (viz.) That the Rent exceeded the value of the Land, and relied upon his tender of a Surrender, which is nothing to the purpose, whether Judgment can be here for him, and that otherwise his Plea is double? But because the Plaintiff hath not demurred to that, but answered only to one part of it, the Defendant might well demurr upon the Replication, because it does not answer all contained in the Plea, for unless the Party demurs for doubleness he is bound to answer all the matters alleged. Et adjournatur. But being this Term moved again, Judgment was given for the Plaintiff, because the Defendant relinquished the material part of his Bar, and offered matter meerly frivolous.

*Cartwright versus Pinkney.*

Raym. 222.  
2 Lev. 80.  
2 Mod. 174.  
175.  
Ante 242,  
242.  
3 Keb. 131,  
137, 466,  
488.

**T**enant for years surrenders to the Lessor, reserving a Rent; the question was, Whether it was a good Reservation? And held, That it was upon the Contract, and that Debt lay after the first day was incurred wherein it was reserved to be paid, for it was in the nature of a Rent, and not of a Sum in Gross. Ante, Wilston and Pilkney. 242.

*Anonymus.*

Postea 329.

**I**n Trespass for fishing in his several Fishery & pisces cepit. After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff ought to have alleged what kind of Fishes and the number of them as in Playter's Case, 5 Co. is. But for that it was said on the other side, That at that time they were more strict in the certainty of pleading than since, for now an indebitur Assumpsit for Work done, or Goods sold, is allowed without further certainty. And that however the Oxford Ad, 15 Car. 2. here helped it; for tho' this be none of the defects there enumerated; yet the words of the Ad being, That Judgment shall not be arrested for any other exception that doth not alter the nature of the Action, or Trial of the Issue, shall extend to this Case. But the Court were of Opinion, that none of the Ads had aided this Case, in regard, that there was not so much as the number of the Fishes expressed; as if a Man should bring Trespass for taking of his Beasts, and not say what. But Hale said, Trover for a Ship cum velis had been allowed, because all made but one aggregate Body, both the Ship and Sails. But Trover pro velis would not be good. Vid. 2 Cro. 435. Trespass quare clausum fregit & Spinas cepit, and 3 Cro. 553. Child and Greenhill's Case.

Dr.

Dr. Webb *versus* Batchelour, & al'.

**I**N Trespals for taking so many Cows; upon Not Guilty a Special Verdict was found;

3 Ke 6. 476,  
507.  
2 Lev. 139.

That an Act of this King for repairing of the High-ways appoints, that such persons as keep Carts and Horses, &c. should send them at certain times to assist in the repairing of the Ways, not having a reasonable excuse, and that warning was given to the Parishioners of the Parish whereof the Plaintiff was Parson, to send in their Carts; and that the Plaintiff omitting to do it; a Justice of Peace made a Warrant to the Defendant, to distrain him according to the Authority given by the Act, &c. It was alledged for the Plaintiff,

First, That Clergymen were not obliged by this Act; for Ecclesiastical Persons have always had Immunities from such charges, as Pontage, Murage, &c. and shall not be comprehended in the general word, Parishioners.

*v. 22. H 8. c. 5. Quia if exemption could taken away.*

Secondly, That in regard the Act allows an Excuse, the Justice of the Peace ought to have caused the Plaintiff to have appeared before him, to have seen whether he had an Excuse before he could have made his Warrant; and tho' the Officer that executes the Process of a Court of Record be indemnified, where the proceeding is erroneous; yet 'tis not so where the Proceeding is not of Record, as the 10 Co. in the case of the Marshalsey. 3 Cro. 394. Nichols *versus* Walker and Carter, Where a Warrant was made by a Justice of the Peace to distrain for a Doors Rate: Trespals was maintained against the Officer that executed the Warrant, because the Plaintiff was not chargeable as an Inhabitant of the Parish, for whose Poor the Rate was made.

Curia contra. 1. The Clergy are liable to all publick charges imposed by Act of Parliament; and that hath been resolved, as Hale said, upon debate before all the Judges. 2. The Officer that executes the Warrant (tho' unduly made for the cause alledged) is not answerable, for he is not to judge, but to execute the matter, it being within the Jurisdiction of the Justice of the Peace: and 'tis not like the Case in the 3 Cro. for there the Churchwardens and Overseers of one Parish distrained in another Parish, which was out of the limits of their Authority; but in 14 H. 8. 16. where a Justice of the Peace made a Warrant to arrest a Man for Felony, (which in those times was held beyond his power, tho' otherwise since, unless there had been some Indictment of Record) yet 'tis there held, that the Officer that executes such Warrant is not punishable. Wherefore Judgment was given here for the Defendants.



Termino Sancti Michaelis, Anno 27 Car. II.  
In Banco Regis.

Anonymus.

**A** Judgment was removed by Error into this Court, and affirmed, the Capias that is awarded thereupon must mention it, and not be general as upon a Judgment originally in this Court; and if such a Writ issues out, the Court will upon motion grant a Superedeas, and there needs no Writ of Error in Ad-dicatione Executionis, tho' it was taken out in a former Term.

Anonymus.

**L**ibel was (by the Churchwardens of, &c.) in the Ecclesiastical Court for 1 l. 10 s. 8 d. upon a Custom for payment of so much, for being buried in the Body of the Church; and a Prohibition was prayed, suggesting that there was no such Custom. The Court held such a Custom must be good, because the Parish is to be at the charge to make up the Church Floor; but if the Custom be denied, it must be tried at Law: And therefore inclined, that a Prohibition was to go; tho' it was objected, that this duty belongs properly to the Ecclesiastical Court, and no remedy for it elsewhere; for so is the Case of a modus decimandi, which may be demanded in the Spiritual Court; but if the Custom be denied, there shall be a Prohibition; and so the case of a Portuary, since the Statute of H. 8. And it afterwards being moved again, Hale Chief Justice being present, the Prohibition was granted. Which, Hale said, was sometimes granted pro defectu Jurisdictionis, and sometimes pro defectu Triationis, as in this case and others, where the ground of the Suit is Prescription, for in their Law they have sometimes allowed Prescriptions of 20 years, sometimes of 40 years, but we admit none but what are de temps dont, &c. Ante 265.

1 Sid. 283.  
1 Mod. 167,  
176.  
Ante 3, 120,  
265.  
2 Vent. 239.  
Cr. Car. 238.  
Hob. 247.  
3 Mod. 268.

St. John *versus* Moody.

2 Lev. 148.  
Postea 319.  
3 Keb. 528,  
531.  
Saunders  
and Wil-  
liams,

**I**n an Action upon the Case, the Plaintiff declared, That he was possessed of a Wood, and that he had a way leading from such a place to the said Wood, and that the Defendant had obstructed it.

Upon

Upon not Guilty it was found for the Plaintiff, and moved in Arrest of Judgment, That the Plaintiff had not set forth his Title to the Way, whether by Prescription or otherwise; and this ought to be, that the Defendant might be ascertained what to make defence unto: Also 'tis proper to the nature of an Action upon the Case, to set forth the Case at large.

Curia contra. The Action here is grounded upon the Possession; indeed, if Trespafs were brought by the Owner of the Soil in a justification for a way, 'tis necessary to express by what right 'tis claimed; but this (for ought appears) may be against a Stranger. In an Assize for a Rent against the Terre-tenant, he may demand Judgment, whether he ought to answer before Title made? otherwise, of an Assize brought against the Person of a Man's Rent. Where 'tis pleaded, that the Party ought to keep the fence, it sufficeth to say occupatores reparare consueverunt; for in truth, the greatest part of the Enclosures in England have been within time of Memory. The Writ of Curia claudenda, is only quod debet & solet; 'tis true, before 7 Jacobi, the usage has been in Actions of this nature to prescribe, but not since. Vid. 2 Cro. 43, 123. 3 Cro. 499 & 575. Sands and Trefusis's Case, and 325. Symonds and Seabourn. Whereupon Judgment was given for the Plaintiff.

Note, This Case was afterwards affirmed upon a Writ of Error in the Exchequer Chamber.

*Drue versus Bailly.*

**T**HE Case was, An Executor had a Term, and let part of it, reserving a Rent, and made his Executor and died. The question was, Whether the Executor should have the Rent or the Administrator de bonis non? And it was held, that the Executor should have it.

*Bell versus Thatcher.*

**I**N Error upon a Judgment given in the Court of Common-Pleas, where the Plaintiff in an Action upon the Case declared, That he had been retained by the Under-Postmaster, to carry about Post Letters, of which he made a profit, and had behaved himself honestly in that Employment. And that the Defendant to defame him said, he had broken up Letters, and taken out Bills of Exchange, which brought him to such discredit, that he lost the said Employment. And Judgment was given for the Plaintiff, and Error assigned upon the matter, for that the words do not import, but that he might break open the Letters, by the direction of those to whom they were directed; neither do they express that they were Post Letters; and the innuendo will not help it, unless there had been such a signification



in the words. Neither is it such an Employment that an Action should lie for Scandalizing. Also the Plaintiff does not declare, That he was retained for a year, and seems to be little more than a Common Porter. And for these reasons, by the Opinion of the Court the Judgment was reversed; and (Hale) principally from the quality of the Employment; for he said a Man should not speak disparagingly of a Man's Cook or Groom, but an Action would be brought if such Actions as these should be maintained.

Anonymus.

<sup>2</sup> Lev. 150.  
<sup>3</sup> Keb. 546.

**I**N an Action for words, the case was, That the Defendant speaking to the Plaintiff, said thus, I know my self and I know you, I never buggered a Mare; And the Opinion of the Court was, that the words were actionable, or else there might be sly ways to defame any Man and evade an Action.

Hodgkins *versus* Robson and Thornborow.

<sup>2</sup> Lev. 143.  
<sup>3</sup> Keb. 500,  
505, 518,  
541, 557.

**I**N Debt for Rent; The Defendants pleaded in Bar to the Action, That the Plaintiff had entered in a Back-yard, part of the Land demised, by Force and Arms, &c.

The Plaintiff replied, That he ought not to be foreclosed of his Action, for that the Defendant had let that Back-yard to J. S. for a lesser Term, reserving no Rent; and that J. S. entered, and after assigned unto the Plaintiff, &c. which is the same Entry in the Bar.

The Defendants rejoin, That J. S. did not enter, to which it was demurred: And after it was several times spoken to at the Bar, Judgment was given this Term by the whole Court for the Plaintiff, (viz.) Hale Chief Justice, Twisden, Rainsford, and Wylde. And

First, They all held, That as the Pleading was in this case, there could be no Apportionment of the Rent, for when there is to be an Apportionment, either the Jury shall do it upon nil debet pleaded, or the Defendant may in his pleading set forth the value of the Land, and to what the Apportionment shall be. Hale said, If the Lessee redemise part to the Lessor reserving a Rent, there shall be no Apportionment; for the Parties, by the Reservation, have ascertained what Rent shall be allowed for that part; but where there is no Rent reserved upon the Redemise, there shall be an Apportionment; but if part be assigned by the Lessee to a Stranger, who assigns it to the Lessor, and the Lessee had reserved no Rent, in that case there shall be no Apportionment; for the Lessor comes under the benefit of the Stranger's Contract. And Hale resembled it to the Case of Lord and

and Tenant by an entire Service; if such Tenant aliens part, the Service is multiplied; and after it be conveyed to the Lord, the entire Service still remains upon the Tenant that holds the residue. A Rent upon a Lease is not within the Statute of Quia emptores terrarum; yet in many Cases there shall be an Apportionment at Common Law. If the Lessor enters into part by Wrong, this shall suspend the whole Rent; for in such case he shall not so apportion his own Wrong, as to enforce the Lessee to pay any thing for the residue. Otherwise of a Rightful Entry into part, as in the Case at Bar. 'Tis true, in Ascough's Case in the 9 Co. 'tis said, a Rent cannot be suspended in part, and in esse for part. And so in the 4 Co. Rawlin's Case, it is held, That the whole Rent is suspended, where part is redemised to the Lessor. But the Court observed, that the Resolution of that Point was not necessary to the Judgment given in that Case, which was upon the Extinguishment of the Condition, which is entire, and not to be apportioned: But as to the Rent, no Book was found to warrant such an Opinion, but Brook, tit. Extinguishment 48. where 'tis said, If there be Lord and Tenant by three Acres, and the Tenant lets one to the Lord for years, the whole Rent is suspended. This Case is not found in the Book at large. And in 7 Ed. 3. 56, & 57. where a Formedon was brought of a Rent-Service issuing out of three Acres, and as to one Acre it was pleaded, that the Demandant himself was Sole seised, and concluded Judgment of the Writ: But it was ruled to be a Plea to the Action for so much, and to the rest the Tenant must answer; whic his a full Authority, that in such Case the Rent is to be apportioned. And the Case of Dorrell and Andrews, Rolle, tit. Extinguishment 398. is full in the Point, That where Lessee for years lets at Will, which Lessee licences the Lessor to enter, that the Entry of the Lessor thereupon shall not suspend his Rent. For Hale said, Tho' it might be objected, that in regard the Lessee at Will cannot let, the Entry of the Lessor thereupon might be a Disseisin; but that is ever at the Election of the Lessor: And if that were now the question, perhaps the Lessor cannot take such an Entry for a Disseisin.

1 Inst. 148.

It is the common Experience, That where it comes to be tried upon Nil deber, if it be shewn that the Lessor entred into part, to answer this, by proving it was the Lease of the Lessee; and if the Law should not go upon this difference, it would shake abundance of Rents, it being a frequent thing for a Lessor to hire a Room, or other part of the thing demised, for his Convenience.



Hale said, That a Case of a Lease for years was stronger than a Lease for life, where the remedy is by Assize, and the Tenants of the Land (out of which the Rent issues) are to be named: And for a Condition, that must be extirpated where part of the thing demised comes to the Lessor, because 'tis annexed to such a Rent, in quantity: For if the Rent be diminished, the Condition must fail.

Holland *versus* Ellis.

2 Lev. 156.  
3 Keb. 524.

**I**N Trespass Quare clausum fregit, herbas concule' & diversas carectat' tritici ibid' asportavit.

After Verdict it was moved in Arrest of Judgment, That the Declaration did not mention whole the Loads of Wheat were; for it was not ibid' crescent'. Adjournatur.

2 Lev. 140,  
152.  
1 Ven. 181,  
182.  
1 Sid. 90,  
and 101.  
contra.  
3 Keb. 489.  
Apres 352.  
3 Keb. 564,  
566, 604.

Resolved per Cur', That an Inquisition before the Coroner, taken super visum corporis, that finds that the Person was Felo de se, & non compos mentis, may be traversed: But the fugam fecit in an Inquisition before the Coroner cannot be traversed. Ante 239.

Termينو S. Hillarii Anno 27 & 28 Car. II.

In Banco Regis.

The Earl of Leicester's Case.

2 Lev. 149.  
Raym. 239.  
2 Keb. 366,  
459, &c.

**I**N an Ejectment upon a Special Verdict the Case was to this effect:

Robert Earl of Leicester in the .. of Eliz. leased a Fine of the Lands in question to the use of the Earl of Pembroke and his Heirs, for payment of his Debts, reserving a Power to himself to revoke by any Writing indented, or by his last Will, subscribed with his Hand and sealed with his Seal: And some time after he covenanted by a Writing (sealed and subscribed as aforesaid) to levy a Fine to other uses, and after the Covenant a Fine was levied accordingly. And whether this should be taken as a Revocation, and so an execution of the Power, and the extinguishment of it, was the Question?

It was argued by Jones, Attorney General, that this should not be taken as a Revocation.

In Powers of Revocation, there is to be considered the Substance and the Circumstance, and that which revokes must be defective in neither. The Deed alone in this Case cannot revoke; for tho' it has the Circumstance limited, (viz.) Indenting, Writing, Sealing, Subscribing; yet it wants Substance, for it doth nothing in presenti, but refers to a future Act, (viz.) the Fine. If a Man has made his Will, a Covenant after that he will levy a Fine, or a Charter of Feoffment made, will not be a Revocation of the Will, 1 Rolle 615. yet there appeared an intention to revoke; and less matter will revoke a Will than a Deed.

Again, The Fine alone cannot revoke, because it is defective in the Circumstances contained in the Power; but then to consider them both together, how can it be conceived that the Fine should communicate Substance to the Deed, or the Deed give Circumstances to the Fine?

But 'tis objected, That they make but one Conveyance.

I answer, If so, then the words of the Power here are to revoke by Deed, and not by Deed and Fine.

Again, This Construction is repugnant to the words of the Power, which are, That it shall be lawful for him to revoke by his Deed: And yet it is agreed here, that the Deed of it self is not sufficient to revoke, but only in respect of another Act done, which (as it must be observed) is executed at another time. The Books agree, that a Condition or Power, &c. may be annexed to an Estate by a distinct Deed from that which conveys the Estate; but not unless both are sealed and delivered at the same time, and so they are but as one Deed: But in the present Case, the Deed was made in one year, and the Fine levied in another. Suppose the Power to be with such Circumstances as in our Case, and a Deed is made which contains some of them at one time, and another Deed comprehending the rest at another time, Should both those make a Revocation as one Deed? Surely not.

Again, Suppose the Fine had been levied first, and then afterwards such Deed had declared the Uses; surely the Power had been extinguished by the Fine, tho' there the Fine and Deed might be taken as one Conveyance, as well as here.

Again, the different natures of these Instruments makes, that they cannot be taken as one entire Act within the Power; for the Covenant is the Act of the Party, and the Fine the Act or Judgment of the Court.

But it has been objected, That this ought to have a favourable Construction.

I answer, But not so as to dispence with that Form which the Execution of the Power is limited to be done by. In the 6 Co. 33. Powers that are to divest an Estate out of another person are taken strictly, and here (upon the first Fine) the Earl of Leicester had



had no Estate in him. Mich. 6 Car. 1. in Communi Banco, the Case of Ingram and Parker, which tho't it may not be a clear Authority for me, yet I am sure it does not make against me: The Case was, Catesby levied a Fine to the use of himself in Tail, with Remainders over, reserving a Power to himself and his Son to revoke by Deed, &c. (as in our Case) and his Son after his decease (by Deed intended to be enrolled) conveyed to one and his Heirs; and after levied a Fine, and it was held no Revocation;

First, Because he having an Estate Tail in him, the Deed might operate upon his Interest.

Secondly, Because it was but an inchoation of a Conveyance, and not perfected; and they held it no Revocation, and that the Fine levied after, tho' intended to be to the Uses of the Deed, yet should extinguish the Power.

Hale Chief Justice. Upon the close and nice putting of the Case this may seem to be no Revocation; for 'tis clear, that neither the Deed nor Fine by it self can revoke; but quæ non valent singula, juncta profunt. The Case of Kibbett and Lee in Hob. 312. treads close upon this Case, where the Power was to revoke by Writing under his Hand and Seal, and delivered in the presence of three Witnesses, and that then and from thenceforth the Uses should cease. It was there resolved, That a Devise of the Lands by Will (with all the Circumstances limited in the Power) should revoke; yet the Delivery was one of the Circumstances, and the Uses were to cease then and from thenceforth: Whereas a Will which could have no effect while his Death, did strongly import, that the meaning was to do it by Deed, and yet there the Will alone could be no Revocation; for clearly he might have made another Will after, and so required other Matter, (viz.) his Death, to compleat it. And in that Case there is another put, That if a Deed of Revocation had been made, and the Party had declared, it should not take place until 100 l. paid, there the operation of it would have been in suspense until the 100 l. paid, and then it would have been sufficient; yet there it had been done by several Acts, and of several Natures; the Intention in things of this nature mainly governs the Construction. In Terry's Case it was ruled, That if A. makes a Lease for years to B. and then levies a Fine to him, to the end that he might be Tenant to the Præcipe for the suffering of a Recovery, that after the Recovery suffered his Lease should revive. 'Tis true, in the Case at Bar, if the Fine had been levied first, and then the Deed of Uses made afterwards, the Power had been extinguished by the Fine, and so no Revocation (of that which had no being) could have been by the Deed.

Ante 195.

Postea 368,  
369, 371.

Twisden. What if before the Fine levied the Intent had been declared to that purpose?

Hale. I doubt whether that would have helped it. I cannot submit to the Opinion in Parker and Ingram's Case cited, (viz.) That the Deed not being enrolled, should make no Revocation. For in case of a Power to make Leases for Life, it has been always held (by the best Advice) that the better way is to do it by Deed without Livery, (tho' Livery, by the Common Law, is incident to a Lease for Life) and so adjudged in Rogers's Case, for Lands in Blanford forum. In Moor's Rep. where Tenant for life hath power to make Leases for Life, and makes a Lease by Livery, 'tis there held a Forfeiture; tho' I conceive not, because by the Deed the Lease takes effect, and so the Livery comes too late. Therefore the omission of enrolling the Deed (in that case) does not seem to be material; but if that Opinion be to be maintained, it is, because the Party had such an Interest, upon which the Deed might enure without Execution of his Power, and so rather construed to work upon his Interest. But that Reason does not satisfy, because such an Estate as was intended to be conveyed, could not be derived out of his Interest; therefore it should take effect by his Power, according to Clere's Case in the 6 Co.

So by the whole Court here, the Deed and Fine (taken together) were resolved to be a good Execution of the Power, and Judgment given accordingly.

Richardson *versus* Disborow.

A Prohibition was prayed to the Ecclesiastical Court, where the Suit was for a Legacy; and the Defendant pleaded, That there was nothing remaining in his hands to pay it, and that he had fully administered: And producing but one Witness to prove it, Sentence was given against him, and after he appealed, and because their Court gave no regard to a single Testimony, he prays a Prohibition. 2 Keb. 570, 576, 579.

But it was urged on the other Side, That it being a Matter within their Cognizance, they might follow the Course of their own Law: And tho' there are diversities of Opinions in the Books about this Matter, yet since 8 Car. 1. Prohibitions have been denied upon such a Surmise. 2 Cro. 269.

Hale. Where the Matter to be proved (which falls in incidently in a Cause before them) is Temporal, they ought not to deny such Proof as our Law allows; and it would be a great Mischief to Executors, if they should be forced to take two Witnesses for the payment of every petit Sum: And if they should, after their Death there would be the same Inconvenience. In 3 Mod. 286.

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one Witness to prove the Revocation of a Will: Which is a stronger Case, because that entirely is of Ecclesiastical Cognizance. Wherefore let there go a Prohibition, and let the Party (if he please) demur upon the Declaration upon the Attachment. Hob. 188. 1 Cro. 88. Popham 59. Latch 117.

*Pigot versus Bridge.*

**I**N Debt upon a Bond, conditioned for performance of Covenants; and the Breach assigned was, in the not quietly enjoying the Land demised unto him.

The Defendant pleads, That the Lease was made to hold from Michaelmas 1661. to Michaelmas 1668; and that paying so much Rent half-yearly, he was to enjoy quietly; and shews, that he did not pay the last half year's Rent, ending at Michaelmas 1668. To which the Plaintiff demurred, supposing that the words being to Michaelmas 1668. there was not an entire half-year, the Day being to be excluded; and that it was so held in the Case of Umble and Fisher, in the 1 Cro. 702.

Cur' contra. 'Tis true in pleading usque tale Festum will exclude that Day; but in case of a Reservation, the Construction is to be governed by the Intent.

Anonymus.

2 Lev. 110.  
3 Keb. 462,  
517, 530.

**N**Ote per Hale. Debt doth not lie against the Executor of an Executor, upon a Surmize of a Devastavit by the first Executor. For,

First, 'Tis a Personal Tort, for which his Executor cannot be charged.

Note, a Statute made since hath altered the Law in this Point.

Secondly, 'Tis such an Action of Debt, as would have admitted Wager of Law, and therefore lies not against the Executor. It was difficultly brought in, that Debt should lie against the Executor upon a Surmize of a Devastavit by himself. But that Point is now settled, but no Reason to extend it further. And he cited a Case, where Debt was brought against A. Executor of B. Executor of C. who pleaded, that he had not of the Goods of C. in his hands.

2 Saun. 116.

To which the Plaintiff replied, That B. had wasted the Goods of C. to the value of the Debt demanded. Upon which Issue was joined and found for the Plaintiff, and he had Judgment to recover de bonis B. in the hands of A. But that Judgment was reversed.

Anonymus

Anonymus.

**I**f A. engages, that B. shall pay for certain Goods that B. buys of C. this is good to charge him upon a Collateral Promise, but not upon an Indebitatus Assumpsit; for it doth not create a Debt. Ante 268.  
Postea 311.

Anonymus.

**I**n an Information for a Riot, it was doubted by the Court, whether it were Local, being a Criminal Cause? And it was observed, That divers Statutes in Queen Elizabeth and King James's time provided that Prosecutions upon Penal Laws should be in their proper Counties. Which was an Argument, that at the Common Law they might have been elsewhere.

Taylor's Case.

**A**n Information exhibited against him in the Crown Office, for uttering of divers Blasphemous Expressions, horrible to hear, (viz.) That Jesus Christ was a Bastard, a Whoremaster, Religion was a Cheat; and that he neither feared God, the Devil, or Man. 3 Keb. 607,  
621.

Being upon his Trial, he acknowledged the speaking of the Words, except the word Bastard; and for the rest, he pretended to mean them in another Sense than they ordinarily bear, (viz.) Whoremaster, i. e. That Christ was Master of the Whore of Babylon, and such kind of Evasions for the rest. But all the Words being proved by several Witnesses, he was found Guilty.

And Hale said, That such kind of wicked Blasphemous Words were not only an Offence to God and Religion, but a Crime against the Laws, State and Government, and therefore punishable in this Court. For to say, Religion is a Cheat, is to dissolve all those Obligations whereby the Civil Societies are preserved, and that Christianity is parcel of the Laws of England; and therefore to reproach the Christian Religion is to speak in Subversion of the Law.

Wherefore they gave Judgment upon him, (viz.) To stand in the Pillory in three several places, and to pay One thousand Marks Fine, and to find Sureties for his Good Behaviour during Life.



Walker *versus* Wakeman.3 Keb. 544,  
547.

**T**HE Case was, An Estate which consisted of Land and a Rectory, &c.) was conveyed to the use of one for Life, &c. with a Power to let the Premises, or any part of them, so as such a Rent was reserved for every Acre of Land. The Tenant for Life demised the Rectory reserving a Rent, which Rectory consisted of Tithes only, and whether this was within the Power, was the Question?

Serjeant Pemberton argued, That this Lease is not warranted by the Power; for a Construction is to be made upon the whole Clause, and the latter Words that appoint the Reservation of the Rent, shall explain the former, and restrain the general Word Premises to Land only; for if it shall be extended further, the Settlement (which was in Consideration of a Marriage-Portion) is of no effect for the Rectory: As in case it should be demised, reserving no Rent; which it might be, if not restrained to the latter words, they applied only to the Land.

But it was resolved by the Court, That the Lease of the Rectory was good; for the last Clause being Affirmative, shall not restrain the Generality of the former. And this Resolution was chiefly grounded upon Cumberford's Case in the 2 Rolle 263. where a Conveyance was made to Uses of divers Manors and Lands, with a Power to the Cestuy que use for Life, to make Leases of the Premises, or any part of them, so that such Rent or more were reserved upon every Lease, which was reserved before within the space of two years; and a Lease was made of part of the Lands, which had not been demised within two years before: And resolved, It was a good Lease, and that thereupon any Rent might be reserved; because the Power was General, to lease all; and the restrictive Clause should only be applied to such Lands as had been demised within two years before.

Termino

Termino Sanctæ Trinitatis, Anno 28 Car. II.

In Banco Regis.

**M**emorandum, The last Term Sir Richard Rainsford was made Chief Justice, (Hale Chief Justice quitting it for infirmity of Body) and Sir Thomas Jones was made one of the Justices, of the Court of King's Bench.

Anonymus.

**I**n an Action upon the Case brought against the Defendant, <sup>2 Lev. 172.</sup> for that he did ride an Horse into a place called Lincoln's-Inn-<sup>m. c.</sup> Fields, (a place much frequented by the King's Subjects, and <sup>3 Keb. 650.</sup> unapt for such purposes) for the breaking and taming of him, and that the Horse was so unruly, that he broke from the Defendant, and ran over the Plaintiff, and grievously hurt him, to his damage, &c.

Upon Not Guilty pleaded, and a Verdict for the Plaintiff, it was moved by Simpson in Arrest of Judgment, That here is no cause of Action: for it appears by the Declaration, that the mischief which happened was against the Defendant's Will, and so Damnum absque injuria; and then not shew what right the King's Subjects had to walk there; and if a Man digs a Pit in a Common into which one that has no right to come there, falls in, no Action lies in such Case. T. Jones 205.

Curia contra, It was the Defendant's fault, to bring a Wild Horse into such a place where mischief might probably be done, by reason of the Concourse of People. Lately, in this Court an Action was brought against a Butcher, who had made an Ox run from his Stall and gozed the Plaintiff; and this was alledged in the Declaration to be in default of penning of him.

Wylde said, If a Man hath an unruly Horse in his Stable, and leaves open the Stable-Door, whereby the Horse goes forth and does mischief; an Action lies against the Master.

Twisden. If one hath kept a tame Fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the Fox doth after he hath lost him and he hath resumed his wild nature. Vid. Hobarr's Reports 134. The Case of Weaver and Ward.

Anno-



Anonymus.

1 Sid. 330.

**I**N Trespass in an inferiour Court, if the Defendant plead son Frank Tenement, to oust the Court of Jurisdiction, it was said by Wylde, That they might enforce the Defendant to swear his Plea, as in case of Foreign Plea; (Negatur per Twisden) and as in this Court, where a Local justification in Trespass, &c. is pleaded, the Defendant must swear it: But the Court held, no Indisment will lie for Perjury in such Oath, no more than upon a Magister of Law.

Anonymus.

**I**N Trover the Distringas Juratorum was returnable die Martis prox' post mensem Paschæ. Nisi prius Richardus Rainsford Mil', &c. venerit die Lunæ in mensem Paschæ, instead of post mensem, and so objected, That there was no Authority to try the Cause, there being no such day: And the Court seemed to be of that Opinion, and that there was no Record by which this could be amended, but the Parties agreed to go to a new Trial; and so this Point did not come to be fully resolved.

Woodward versus Aston.

2 Mod. 95.

**A**N Indebitat' Assumpsit, was brought by the Plaintiff against the Defendant for 10 l. received of his Money. Upon Non Assumpsit pleaded and a Trial at the Bar (which the Court permitted, because the Parties were Officers of the Court,) the Case appeared to be thus;

The Master of the King's Bench Office, or Chief Clerk, had granted the Office of Clerk of the Papers, (and it was agreed on all hands, that it was his to grant it) to Woodward, the Plaintiff, and one Vidian, and the longer Liver of them.

Vidian, being a Recusant, and knowing himself disabled by the late Act of Parliament to continue in the Office, prays the Court that Aston might be admitted in his room, which was done accordingly, and within two or three years after Vidian died, and Woodward commenced this Suit against Aston, supposing that he had no right in the said Office.

The Plaintiff, to entitle himself, shewed a Copy of the Enrolment in this Court, of the Deed of Grant of the Office, to him and Vidian. And it was objected on the Defendant's part, that this was not Evidence, but they ought to produce the Grant it self; for tho' the Enrolment of a Bargain and Sale is Evidence because the Estate passes by the Enrolment, without which the Deed would not be sufficient; yet here the Deed passes the Office, and the Enrolment is but as it were a Copy. But the Court ruled, That the

Enrol-

Enrolment might be given in Evidence; and of Grants of Offices in this Court, it has been the course to enrol Deeds. Then the Deed it self was produced by the Defendant, which was cancelled, and urged by his Counsel, that the Estate in the Office was thereby destroyed.

Curia contra. Not as to the Plaintiff, unless it appeared, that he had a hand in the cancelling of it. But then for the Plaintiff it was said, That this was an entire Office, tho' granted to two; and one could not surrender or grant his Interest. But then the Counsel for the Defendant shewed, That when the Defendant was admitted into the Office, the Court demanded of the Plaintiff whether he consented? and he said salvo jure, and seemed unwilling at first; but afterwards the Chief Justice demanded of him, whether he would execute it alone? and told him he knew such things of him which would make appear that it was not proper for him so to do, and then he said he submitted, and the Defendant was admitted thereinto, and afterwards Sir Robert Henly, Chief Clerk, made a new Grant to the Plaintiff and Defendant of that Office, which the Plaintiff knew of, and joined in Execution with the Defendant; which, as was urged, amounted to a surrender of his former Grant. (In 3 Cro. 197, 258. it is said, if an Officer for life accepts of a new Grant, 'tis no Surrender of his former Estate.) The Court did not deny, but that if it did appear, that the Plaintiff had accepted this new Grant, it would be a Surrender, and thereupon that matter of fact was left to the Jury, and they found for the Defendant.

The Court said in this case, That a Rent or other Grant, was not lost by the destruction of the Deed, as a Bond or chose en Action was. (Quære, if the Party himself cancel it,) and if the Grantee of the Rent delivers up the Deed to the Grantor, this is no Surrender; but he may sue for his Rent, if he can recover the Deed again, for a Chose en Grant must be surrendered by Deed.

Curtis & al' *versus* Collingwood.

In an Assumpsit, the Plaintiffs declared, That the Defendant was excommunicated at their Prosecution, for not paying of a Tax made for the Reparation of a Church of which they were Churchwardens; and that in consideration, that the Bishop would absolve the Defendant, at the Defendant's special Instance and Request, the Defendant promised to pay unto the Plaintiffs so much. After Verdict, it was moved in Arrest of Judgment, That there was no consideration on the part of the Plaintiffs; yet the Plaintiffs had Judgment; for it cannot be intended, but that the Bishop absolved the Defendant at their instance, and would not have done it, but upon the account of the Promise, of paying the Money to them.



Termino Sancti Michaelis Anno 28 Car. II.

In Banco Regis.

Anonymus.

**A** Bill of Middlesex was issued out by an Attorney of this Court against the Countess of Huntingdon, which was discharged by Superedeas without pleading, because it appeared by the Record that she was a Peeress, and the Attorney was committed for suing out of the Process.

The City of London against Goree.

2 Lev. 174.  
3 Keb. 480,  
491.

**A** Bill of Assumpsit was brought for the Duty of Scavage, and declared upon the Custom of London, that every one which exposes Foreign goods to Sale, which had been entred in the Custom-house, shall pay so much for shewing of them: After Verdict, it was alledged in Arrest of Judgment, That no Assumpsit lay for such a Duty, for there ought to be a Contract express, or implied, to maintain an Assumpsit.

Again, forasmuch as the Customs of the City are confirmed by Parliament, this is a Duty by Record: Sed non allocatur; for there are multitudes of Precedents in such like Cases. An Assumpsit lies upon a Bill of Exchange accepted; an Assignee of Commissioners of Bankrupt may bring an Assumpsit, and yet the Debt is assigned by Vertue of an Act of Parliament. And the Court said, In such case as this the Declaration might be upon an Indeb. Assumpsit, as it was in the Case at Bar.

Molyn *versus* Cook & al'.

3 Keb. 676.

**I**n Trespass for Assault, Battery and Imprisonment, until the Plaintiff was forced to spend 20 l. and deliver up a Bond of 100 l. to be cancelled, wherein one Lamplugh, one of the Defendants, stood bound to him.

Cook pleads his privilege, as Clerk to one of the Protectors of the Common Pleas. The Plaintiff replies, That this Trespass, &c. was done by them jointly, and that he had taken out an Original against them all; and that this Declaration against Cook was upon that Original, and that he still prosecuted the rest, (viz.) Lamplugh and Jeffries, to which the Defendant demurred: And Judgment was given, (Twisden and Jones only present) quod respondeat ouster.

ouster, for Cook being joined with others in the Action, he shall have no privilege, as Powel's Case, Dyer 377. he being Clerk of the Crown, was sued with his Wife, and not allowed his Privilege, because sued with his Wife. Vid. Poph. Rep. 329. and Roll. Abr. 1. p. 493.

Brown *versus* Wait.

**I**N Ejectment, the Case upon a Special Verdict was to this effect; Sir John Danvers being seized of the Lands, &c. in Tail, with the Fee Expectant, Anno 1646 and in 1647, levied a Fine to the same Uses as he was before seized, save that a Power was reserved to make Leases for any number of Years, and without reserving any Rent. Sir John Danvers did after become Guilty of Treason, in Murdering of King Charles the first in 1648, and died in 1655.

In 13 Car. 2. cap. 15. the Statute, commonly called the Statute of Pains and Penalties, enacts, That sundry of the Offenders in that execrable Treason, of which Sir J. D. was one, should (amongst other Penalties there inflicted) forfeit all their Lands, Tenements and Hereditaments, Leases for Years, Chattels real, and Interest of what nature or quality soever, See the Act of 14 of this King. The Lands were by Patent granted to the Duke of York, who let them to the Defendant, and John Danvers, Heir of Sir John Danvers, entered, and made the Lease to the Plaintiff: It had been several times argued at the Bar, and this Term Judgment was given by the Court for the Defendant. And Rainsford Chief Justice delivered the Opinion of the Court, and the Reasons for himself, Twissden, Wylde and Jones, as followeth.

The Question being, Whether an Estate Tail were forfeited by the Words of the Act of 13 Car. 2? It was observed, that all Estates were Fee simple at the Common Law and forfeitable. W. the 2. de donis was the first Statute that protected Estates Tail from Alienations, and from all Forfeitures of all kinds, and so continued until the 12 E. 4. Taltarum's Case, from which time common Recoveries have been held not to be restrained by the Statute de donis, (and by the way it must be considered, that Perpetuities were never favoured.) Then came the Statute of 4 H. 7. of Fines, which with the Explanation of the 32 H. 8. have been always resolved to bar the Issues in Tail; so as to Alienations, Estates Tail were set free, but were not forfeitable, no not for Treason, until the 26 H. 8. by which they became subjected to Forfeitures in case of Treason, and so by 5 E. 6. But 'tis true, these Statutes extend only to Attainders, and 33 H. 8. sells the Lands, &c. in the King's possession without Office: Thus having considered the History and Progress of Estates Tail, the Reasons why such an Estate should be construed to be forfeited upon this Act of 13 Car. 2. are these;

2 Lev. 169.  
Ch. Just.  
Jones 57, 58.  
&c.  
2 Mod. 130.  
3 Keb. 459.

Ch. Just.  
Jones R. 59.  
2 Vent. 39.



First, The Crime mentioned is of the same Nature, and with the same Aggravations, as in 12 Car. 2. by which the Offenders are attainted of Treason, &c. for they are called Perpetrators of that execrable Treason, with many Expressions to the like effect; which was looked upon as an Offence of that heinous Nature, that the same Parliament enacted an Anniversary Humiliation throughout the whole Kingdom, to be perpetually observed upon the account of it; as if, not only they that acted it, but the whole Kingdom and their Posterity, (like to another Original Sin) were involved in the Guilt of it, *Nati natorum & qui nascuntur ab illis*; and therefore the Punishment shall not be mitigated in any other manner, than is expressly provided by that Act.

Secondly, It is proved by the generality, and comprehensions of the Words which are made use of, (*viz*) Possessions, Rights, Hereditaments of what nature soever; Interests, which does as well signify the Estate in the thing as that wherein the Estate is, which can have no effect if not extended to Estates Tail. We must observe also, that at the making of this Act, entailed Lands were not protected from forfeitures, and tho' 26 H 8. extends only to Cases, where the Offender is attainted; yet 'tis of good direction to the Judges in Cases of like nature; and 'tis plain, that by this Act of 13 Car. 2. the Offenders were looked upon in *pari gradu* with these attainted; for when the Preamble comes to save the Estates of Strangers, &c. in trust for whom the Offenders were seized, it is said, notwithstanding any of the Convictions or Attainders aforesaid.

Thirdly, It is to be observed, That the Act takes notice, that divers of the Offenders included in this Act were dead; now in regard most Lands are known to be entailed, if the Act had not intended such Estates to be forfeited, it would signify nothing indeed; if the Offenders had been alive it might have been somewhat satisfied with the Forfeitures during their Lives; but as the case was, it should be of no effect at all, after making a great noise of Forfeitures and Confiscations, the Act would have been but a Gun charged only with Powder, or as in the Fable, *Parcuriunt Montes*, &c.

Fourthly, It is manifest, That the Parliament did not intend that the Children or Heirs of the Persons within the Penalties of the Act, should have any benefit of their Estates; for in the saving which is made for Purchasers upon valuable Considerations, the Wives, Children and Heirs of the Offenders are excepted; then surely if they would bar them of the benefit of their Purchases, a fortiori from inheriting to an Estate Tail, especially of a voluntary Entail, that seems to be made with a prospect of this Treason, which was perpetrated a Year after, and such an Entail as scarce the like was ever seen before; that a power should be refer-

red

ded to make Leases for any number of Years, and without Reservation of any Rent. By which it is manifest that Sir John Danvers that committed the Treason, was fully Master of the Estate.

Again, All Conveyances are avoided by the Act, unless such as were upon valuable Consideration; which this Fine was not. The great Case which has been insisted upon by way of Objection, is Trudgeon's Case, Co. Litt. 130. Estates Tail were not forfeited upon the Statute of Præmunire but during the Offender's Life. For answer to that it must be observed, That that Forfeiture is upon the Statute of 16 R. 2. at which time Estates Tail were under the protection of the Statute de donis; but since that time the Judges have not been so strict in expounding Statutes concerning Estates Tail, as appears by Adams and Lambert's Case, 4 Co. That an Estate Tail given for a superstitious Use, was within the Statute of 1 E. 6. cap 4. Where the Words are general, and not so large as in our Case, nor so much to demonstrate the Intent as is in our Act to extend to Estates Tail; wherefore Judgment was given for the Defendant.

Note, They that argued for the Defendant endeavoured to maintain, That if it should be admitted, that Entails were not forfeited by the Act; yet the Estate of Sir John Danvers in those Lands would be forfeited, in regard he levied a Fine in 1647, and the Act of 13 Car. 2. extends to all Lands, &c. whereof the Persons therein mentioned were seized, &c. since 1646, and he being Tenant in Tail and levying of a Fine, there is an Instantaneous Fee in him, out of which the new Estate Tail is supposed to be created, and that cannot hold, being derived out of a Fee subject to the Forfeiture by Relation; but this Point was not touched by the Judges, for that they were fully agreed upon the other Point.

#### Beasley's Case.

**H**E was taken in Execution upon a Recognizance of Bail, Ch. Just. and he made it appear to the Court, That he never acknowledged the Recognizance, but was personated by another; and Jones R. 64. thereupon it was moved, that the Bail might be vacated and he 3 Keb. 604. discharged, as was done in Cotton's Case, 2 Cro. 256. But the Court said, Since 21 Jac. c. 26. by which this Offence is made Felony (without Clergy,) it is not convenient to vacate it until the Offender is convicted, and so it was done 22 Car. 2. in Spicer's Case; wherefore it was ordered, that Beasley should bring the Money into Court, and be let at large to prosecute the Offender. Twisden said, It must be tried in Middlesex, tho' the Bail was taken at a Judge's Chamber in London, because filed here; and the Entry is venit coram Domino Rege, &c. so it differs from a Recognizance acknowledged



ledged before my Lord Hobart, upon 23 H. 8. at his Chamber, and recorded in Middlesex, there Scire facias may be either in London or Middlesex, Hob. Rep. 195, 196.

2 Sid. 90.

If a false Bail is acknowledged, it is not Felony, unless it be filed, and so held in Timberly's Case.

The King *versus* Humphreys & al'.

3 Keb. 739,  
764.

**A**N Indictment upon the Statute of Maintenance, and one only found Guilty; and it was moved in Arrest of Judgment, That seeing but one was found Guilty, it did not maintain the Indictment. 2 Roll. 81. Several were indicted for using of a Trade, and said uterque eor' usus fuit, and held not good. Sed non allocatur; for that in that case in Roll. the using of the Trade by one, cannot be an using by the other. But this is an Offence, that two may join in, or it may be several as in a Trespass.

But then it was alledged, That the Maintenance was in quodam placito, in Cur' coram Domino Rege pendent', and not said where the King's Bench sate, and this was held fatal.

Termino Sancti Hillarii, Anno 28 & 29 Car. II.

In Banco Regis.

Jay's Case.

3 Keb. 714

Postea 327.

**A**Mandamus to restore to his place of a Common Council-Man in the Corporation of Eye in Suffolk. The return was that he was amoved for speaking of opprobrious Words of one of the Aldermen, (viz.) That he was a Knave, and deserved to be posted for a Knave all over England. And it was moved that the Return was insufficient, for Words are not good Cause to remove a Man from his place in the Corporation. To which it was said, That this is not a disfranchising of him, but only removing him from the Common Council as a Person not fit to sit there. To which Twisden said, That his place there could no more be forfeited than his Freedom; for he was chosen thereunto by the Custom of the place. And Magna Charta is, That a Man shall not be disseised de liberis consuetudinibus; but he held, that Words might be a cause to turn out a Freeman, as if they were that the Mayor or the like did burn the Charters of the Town, or other Words, that related to the Duty of his place. But in the Case at Bar the Words

do not appear to have any reference to the Corporation ; wherefore it was ordered that he should be restored.

The Court said that my Lord Hale held, That Returns of this nature should be sworn, tho' of late Days it has not been used, and that it was so done in Medlicot's Case in Cro. T. Jones 72.

Abram *versus* Cunningham.

**U**PON a Special Verdict the Case appeared to be to this effect :

A. possessed of a Term makes B. Executor, who makes three Executors and dies ; two of them die, and the Will of B. the Executor, not being discovered, Administration is granted cum Testamento annexo, to D. who grants over the Term. The surviving Executor never intermeddles, but so soon as he had Notice of the Will, refused before the Ordinary, and the Point was, Whether the Grant of the Term in the mean time was good? 1 Lev. 182.  
Ch. Just. T.  
Jones 72.  
2 Mod. 146.  
147J  
3 Keb. 725.

Saunders (to maintain it) argued, That to the making of an Executor, besides the Will, there was requisite, that the Executor should assent ; and if the Executor refuses. 'tis as much as if there never had been any. There is no Book which proves the Acts of an Administrator void, where there is a Will and the Executor renounces. Greysbrook and Foxe's Case in Plowden's Com. is, That after Administration granted, the Executor proved the Will. And so in 7 E. 4. 14. in Dormer and Clerke's Case, it was held, That where there was an Executor who after refused, and Administration committed, the Administrator should have all the Rent, (belonging to the Term in Reversion) which accrued after the Death of the Testator. If an Executor be a Debtor, and refuses, the Administrator may sue him : (Which was denied by Twifden, because a Personal Action once suspended, is ever so.) Dyer 372. If one makes an Executor, who dies, and never proves the Will, Administration shall be granted, as upon a dying Intestate ; suppose an Executor de son tort has Judgment against him, shall not there be Execution upon a Term, as Assets in his Hands ? 9 Co. 37. a.

Twifden. It hath been doubted, Whether there could be an Executor de son tort of a Term? or, Whether he were not a Disseisor? And by the same Reason it may be granted in the present Case ; for at least the Administrator here is an Executor de son tort before the Refusal.

Levinz contra. Anciently, Bona Intestati capi solebant in manus Regis, as appears in Hensloe's Case in the 9 Co. And since the Power of the Ordinary hath been introduced, it was only to grant Administration upon a dying Intestate. 4 H. 7. Pl. 10. If the Ordinary cites the Executor to prove the Will, and he renounces,

2. (2) 614. 1/2 alk 303.  
304.



nounces, 'tis said he may grant Administration; which implies, that it cannot be before. So 21 H. 8. cap. 5. is to grant Administration, &c. upon a dying Intestate, or refusal of the Executor; the Interest of the Executor commences before the Probate. In 36 H. 8. 6. an Executor commanded one to take the Goods, and after the Executor refused before the Ordinary, who committed Administration, and the Administrator sued the Person that took the Goods; who justified by the Executor's Command, and it was held good: And a Relation shall never make an Act good, which was void for defect of Power. And the Court seem'd strongly of that Opinion.

But Serjeant Pemberton desiring to argue it, the Court permitted him to speak to it the next Term. Et sic adjournatur.

And afterwards it was argued again, and Judgment was given for the Defendant per totam Curiam.

*Dunwell versus Bullocke.*

**I**n an Action of Trover inter al', de uno Instrumento ferreo, Anglice, an Iron Range.

2 Lev. 177. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That Instrumentum ferreum was too uncertain, and that a Range was the same with a Gate, for which Crates was a proper Latin Word.

Sed non allocatur: For Crates is such a Gate as is before a Prison: But a Fire-Range was not in use in the Romans times, and therefore Instrumentum ferreum is well enough, with the Anglice.

Twisden said, Trover de septem libris has been held good, without saying what they were.

*Blackman's Case.*

**I**t was assigned for Error, That the Venire was to summon probos & legales homines, instead of liberos, and so a material Variance; and alledged, that many Judgments had been reversed for it.

Raym. 417. But the Court here being inform'd, That the Precedents were generally probos instead of liberos, would not allow the Exception.

*The King versus Armstrong, Harrison & al', &c.*

1 Sid. 68.

**T**hey and others were indicted for conspiring to charge one with the keeping of a Bastard-Child, and thereby also to bring him to Disgrace.

After Verdict for the King, it was moved in Arrest of Judgment, That the bare conspiring, without executing of it by some Overt Act, was not subject to an Indictment, according to the Poulterer's Case in the 9 Co. And it does not appear that he was actually charged with the keeping of a Child; nay, 'tis alledged, 'twas but a pretended Child, neither was he by Warrant brought before a Justice of Peace upon such an account; but only that they went and affirmed it to the Party himself, intending to obtain Money from him, that it might be no further disclosed.

Sed non allocatur: For there was as much an Overt Act as the Nature and Design of this Conspiracy did admit, in regard there was no Child really, but only a contrivance to defame the Person, and cheat him of his Money, which was a Crime of a very heinous Nature.

Then it was alledged, That this was tried at the Old-Baily, commonly called Justice-Hall in London; and the Jury came de Warda de Faringdon extra London, which appeared to be out of the Jurisdiction. Sed non allocatur.

For the Name of the Ward is Faringdon extra, to distinguish it from Faringdon infra; but both are known to be in London.

Whereupon Judgment was entred up against them; and Armstrong, which appeared to be the principal Offender, was fined 50 l. and the other 30 l.

#### Burrough's Case.

**H**E and others were indicted, for that they being Church-wardens, Overseers of the Poor, and a Constable, did contemptuously and voluntarily neglect to execute divers Præcepta & Warranta, directed to them by the Bailiffs of Ipswich (being Justices of the Peace) under their Hands and Seals, &c. It was moved to quash it, for that the nature and tenor of the Warrants were not expressed in the Indictment: For unless the Parties know particularly what they are charged with, they cannot tell how to make their Defence.

And for that Reason it was quashed by the Court.

Note, The Court never gives Costs, for not executing of a Writ of Enquiry of Damages, tho' notice be given.

Anonymus.



Anonymus.

**A** Judgment for a Forcible Entry into certain Lands in the possession of J. S. was quashed, for not shewing what Estate J. S. had; and tho' the Word Disseisin were in, the Court held, that though that might be taken to imply a Freehold, yet it was not sufficient, Vid. Mo. 481. And another was quashed, because it was said possessed pro termino: But the Court held, that if it had been pro termino annorum, tho' not said for how many Years, it had been well. 1. Salk. 267.

Note, A Bailiff caught one by the Hand (whom he had a Warrant to arrest) as he held it out of a Window. And the Court said, That this was such a Taking of him, that the Bailiff might justify the breaking open of the House to carry him away.

Kent versus Harpool.

T. Jones 76.  
3 Keb. 731,  
820.

**A** Judgment: The Case came hither by a Writ of Error out of the King's Bench in Ireland, and divers Points were in it which concerned the Ad for Settlement of Lands in Ireland. But the Case was (as to the great Point at Common Law) to this effect:

Father, Tenant for Life, Remainder to the Son for Life, Remainder to first Son of that Son, (who was not born) Remainder to the Heirs of the Body of the Father; the Father died before the first Son was born, and whether the Descent of the Entail to the Son did prevent the Contingent Remainder, was the Question? It was argued, that it did not, because the Inheritance came to the Son by Ad in Law. And the Opinion in Cordal's Case in the 1 Cro. 315. was cited; the great Reason in Chudley's Case, and other Cases, wherein Contingent Remainders have been held to be destroyed, was for the preventing of Perpetuities, which would have been let in, if Contingent Remainders had been preserv'd, whatever Ad had been done by those which had the actual Estate. But there is no such necessity of making the like Construction upon Ads in Law. If Lessee for Years make the Lessor Executor, the Term is not drowned; But if the Executor, that hath a Lease, purchases the Inheritance, the Term is gone, because it is his own ad; but in the other Case, the Law shall not work that, which must be construed a Devastavit. In Lewis Bowles's Case in the 11 Co. and Co. Litt. where there is an Estate for Life, Remainder to the first Son, Remainder in Fee to the Tenant for Life; the Estates at first close and open again upon the Birth of the first Son, which should take the Remainder. And so it may be here.

But the Court seemed to be of Opinion, That the Contingent Remainder was destroyed by the Descent of the Estate Tail. And Rainsford, Chief Justice, relied upon Wood and Ingersol's Case in the 2 Cro. 260. where a Devise was to the first Son for Life, Remainder to the Son which should survive; and there three Judges against one held, That the Descent of the Fee upon the first Son prevented the Contingent Remainder to the Survivor. Et adjournatur. Postea 345.

Note, In Lewis Bowle's Case the Estates were united at the first, upon making of the Conveyance.

*Smith versus Tracy.*

In a Prohibition the Case was, One died intestate; and whether his Brother of the Half Blood should come in for Distribution, (upon the new Statute of 22 & 23 Car. 2. cap. 10.) was the Question?

It was argued, That the Half Blood should have no Share; for the Words are, The next of Kindred to the Dead Person in equal Degree; which the Half Blood is not. The Words likewise are, Those which legally represent their Stocks; and that must be intended, in an Act of Parliament, such as the Common Law makes to be Representatives, and not the Civil Law. For then it would be, that the Bastard-children should come in for Distribution. For their Rule is, that subsequens matrimonium facit legitimum. Granting of Administration was originally Temporal, and came to the Churchmen by the Indulgence of Princes, and therefore must in some sort be governed by the Temporal Laws. In Administrations the Whole Blood ought to be preferred before the Half Blood; for next of Kin shall be taken to be meant by the Statute, such as our Laws judge to be so, Roll. tit. Prohibition 303. and so it was held in one Brown's Case before the Delegates in 8 Car.

This being a new Case, the Court gave no Opinion; but adjourned it to the next Term. Postea 316, 323.



Termo Paschæ, Anno 29 Car. II.

In Banco Regis.

**N**ote, Where Justices of the Peace find a Force, and make Record of it upon their View; they are to commit the Offenders, but cannot restore the Possession.

Anonymus.

**A** Prohibition was prayed to a Suit in the Spiritual Court, for Honey taxed for the Reparation of the Church, upon a Summe that the Tax was imposed upon one part of the Parish, omitting the rest. And for this was cited Roll. tit. Prohibition 291. in the Point.

But the Court doubted, in regard it was not alledged, That they had offered that Plea in the Ecclesiastical Court; because Reparation of Churches is proper for their Cognizance. But the Prohibition was granted, and the other might demur if they thought fit: But afterwards in this Term it was countermanded.

Anonymus.

**A** Prohibition was prayed to the Admiralty, where there was a Libel for a Ship taken by Pirates, and carried to Tunis, and there sold; for that it did not appertain to the Court to try the Property of the Ship, being sold upon Land.

Curia. In regard it was taken by Pirates, it is originally within the Admiral's Jurisdiction, and so continues notwithstanding the Sale afterwards upon the Land. Otherwise where a Ship is taken by Enemies, for that alters the Property: And this was the Opinion of the Court in Eglesfield's Case, in my Lord Hale's time, contrary to my Lord Hobart in the Spanish Ambassador's Case 78. In the 1 Cro. 685. they have Cognizance of the Case of the Pirate, because incident to the Principal Matter.

But afterwards it was observed upon the Libel, that there was no mention made, That the Ship was taken super altum Mare. And tho' there was contained therein very much to imply it, yet the Court held that to be absolutely necessary to support their Jurisdiction.

Ante 123,  
174.

Note. One taken upon an Excom' Cap' was discharged; because *Postea* 338<sup>o</sup> the Writ de Excom' Cap' was not delivered into this Court and enrolled, as is required by the Statute.

*Robinson versus Woolly.*

**I**n an Ejectment upon a Special Verdict, the Case appeared to be thus; 2 Lev. 199.  
Ch. J. Jones,  
78.  
*Postea* 319.  
3 Keb. 747;  
773, 821.  
A Clerk was admitted and instituted to a Benefice within the Diocese of Gloucester whilst the Bishoprick was vacant, and a Mandate from the Archbishop for Induction; but before it was executed by the Archdeacon, a new Bishop of Gloucester was consecrated; and whether the Induction coming after was sufficient, was the Question?

That it was,

It was argued, That after the Mandate made, it was executed so far as the Bishop had to intermeddle in the matter. For if no Induction does follow, the Remedy lies not against the Bishop, F. N. B. 47. h. but an Action upon the Case against the Archdeacon; for the Induction is said to be a Temporal Act, 1 Roll. 125, 195. Whether can such Mandate be revoked by the Bishop, or be inhibited by the King, 1 Roll. 294.

Again, The Archbishop hath a concurrent Jurisdiction with the Bishops throughout his Province, and may admit and institute until the Inferiour Bishoprick is full. And the Statute of 23 H. c. 9. takes away the Jurisdiction of the Metropolitane only as to Proceedings in that Court: In case the Inferiour Ordinary refuses to admit, the Archbishop may do it, as appears Hob. 13. Hutton's Case, and Mo. 879.

It was said on the other side, That this was but an Authority derived from the Bishop, and therefore ceasing before it was executed, is determined. The Bishop may direct his Mandate to another, as well as the Archdeacon. It was compared to a Letter of Attorney, to make Libery, which cannot be done after the Death of him that gave it. Et adjournatur. *Postea* 319.

*Anonymus.*

**I**n an Information of Forgery, the Defendant challenged one of the Jury, for that the Prosecutor had been lately entertained at his House: This was admitted to the favour, tho' against the King, (Vid. for that in the 1 Cro. 663.) And then the Counsel for the King challenged another, and were pressed to alledge the Cause; for 33 Ed. 1. does take away the General Challenge, quia non sunt boni pro Rege,

Q. 2.

But



Raym. 473,  
474

But all the Court (save Wylde, who seemed to be of another Opinion) ordered the Panel to be first gone through, and if there were enough, the King is not to shew any Cause.

*Vertue versus Bird.*

3 Keb. 766.  
2 Lev. 196.

**I**N an Action upon the Case, the Plaintiff declared, That it was agreed between him and the Defendant, that he should carry the Defendant's Timber from a certain place to the Defendant's House; then and there to deliver at such place as the Defendant should appoint; and that such a Day and Year he did carry with certain of his Carts to the place aforesaid, the said Timber, there ready to be delivered, but that the Defendant delayed by the space of six Hours the Appointment of the place; insomuch that his Horses being so hot with carrying of the Timber aforesaid, and standing in aperto Aere. they died soon after.

After Not Guilty pleaded, and a Verdict for the Plaintiff, Venuris moved in Arrest of Judgment, That here did not appear any Cause of Action; for it was the Plaintiff's Folly to let the Horses stand: Neither was the Defendant under the Penalty of an Action bound to receive the Timber, or appoint a place; but in case of Refusal the other might recover what he contracted for the Carriage, having done all on his part; but not to bring an Action for not appointing of a place. And by the Opinion of all the Court the Judgment was stayed. Vid. 2 Cro. 386. Roll. Rep. 275. Baily and Merrit.

*Anonymus.*

**I**T was moved for the setting aside of an Order of Sessions, for the settling a Poor Person in a Town, which had been sent thither by a Warrant of two Justices, and it was confirmed upon an Appeal to the Sessions.

But the Court would hear nothing of the Merits of the Cause; the Order of the Sessions being in such case final, unless there were an Error in the Form.

Note, A Man gives a Warrant of Attorney to confess a Judgment, and dies before the Judgment is confessed: This is a Countermand.

*Anonymus.*

**J**ustices of the Peace at the Sessions ordered the Father of him which had the Bastard Child, to provide for it under the pretence of the reputed Grandfather; for the Statute doth enable them to tax the Grandfather of a Legitimate Child.

But in this Case the Court held, There was no Colour, and therefore quashed the Order. And Wylde said, It was well Westminster-Hall Doors were open.

Kent *versus* Derby.

**I**ndebitatus Assumpsit. The Plaintiff declared, That the Defendant <sup>2 Vent. 36.</sup> being indebted to him in a certain Sum, pro diversis mercimoniis <sup>3 Keb. 756,</sup> ante tunc venditis & deliberatis ad requisitionem of the Defendant to a Stranger, did promise to pay, &c. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That this was but a collateral Promise, and that no Indebitatus Assumpsit would lie, for the Debt was from the Person to whom the Goods were sold. Wylde and Jones held the Action well brought, and cited an Action sur Indebitatus Assumpsit lately in this Court, against one for Honey promised in <sup>Ante 268,</sup> Marriage with his Sister. Vid. R. 120 & 122. Sed Rainsford Chief <sup>293.</sup> Justice contra. But the Plaintiff had Judgment.

Termino Sanctæ Trinitatis, Anno 26 Car. II.

In Banco Regis.

Howlet *versus* Carpenter.

**T**he Case upon a Special Verdict in Ejectment was this; A <sup>3 Keb. 775.</sup> Copyholder of a Dean and Chapter levied a Fine with Proclamation, and five Years passed without any Seizure or Claim by him that was Dean at the time of the Fine levied; and whether the succeeding Dean was barred, was the Question? And the Court at the first opening held clearly that he was not; for if so, the Statutes of 1 & 13 Eliz. which restrain the Alienation of the Church-Revenue, would be of small effect; 11 Co. Case of Magdalen College.

The Company of Ironmongers *versus* Nailer.

**I**n Trespass upon Not guilty, a Special Verdict was to this <sup>Ch. J. Jones,</sup> effect; That Nailer being one of the Officers for collecting of <sup>R. 85.</sup> the Duty of Hearth-Money, distrained for a certain Sum, accru- <sup>2 Mod. 185.</sup> ing for the Chimneys of a new built House which had never been <sup>3 Keb. 719,</sup> inhabited; neither did it appear, that there had been any account of <sup>757.</sup> the Chimneys thereof returned into the Exchequer. There were <sup>Ante 191;</sup> made three Questions: <sup>192.</sup>

First,



First, Whether any thing shall be paid for Chimneys in such new built Houses?

Secondly, Whether the Distress can be for Duty in other places than at such Houses?

Thirdly, Whether there can be any Distress taken before such time as the account of the Chimneys be returned into the Exchequer?

As to the first Point the whole Court were clear of Opinion, That such new Houses which were never inhabited, were chargeable; (for the Words of the first Act are express, (viz.) That every Dwelling and other House, and Edifice (other than such as are after excepted) shall pay. And there is no Exception that extends to such House, altho it were objected, that the proviso in the Act of 14 is, That the Duty shall be chargeable only on the Occupier, and every Clause in the Act runs upon Occupiers; and the Act of 15 recites the King's Revenue to have been much obstructed, for want of full accounts of Chimneys, under the Hands of the Occupiers; and the Act of 16, charges the next Occupiers with the half Year's payment, where the former Occupier removed before it grew due; which implies, that if an House stood empty for longer time it should not be paid.

Again, It is appointed to be demanded at the House, and in case of refusal to distrain; which shews an Intention, that it should be inhabited.

But it was answered, That the Words before mention'd were so full as not to be avoided, and that there were sundry Clauses also in the Act which did import an intention, that empty Houses should pay; and so hath been the Practice ever since the Act, and that there was no manner of difference between these Houses, which were new built, and other Houses; That in case there was no Tenant, the Owner was understood to be Occupier; as if the Owner grants an House in his Occupation, it would be well, if he did not inhabit it himself, if it were inhabited by no other. The Act of the 13 & 14, appoints notice to be fixed upon the Door; for an Account to be given in case there be no Inhabitant, and six days after such notice to enter and take an account, which shews they meant that empty Houses should be chargeable; and why not as well for Chimneys, whereof no use is made?

As to the second Point, The Distress is well taken, tho' it doth not appear to be after an account made into the Exchequer, for the Duty accrues before; and that is provided only, that the King might be apprized of the number of Chimneys, and so there might be a check upon the Collectors when they make their Accounts; neither is any Process appointed to go out upon such Return of the number of Chimneys. The Statute of 21 Jac. appoints Informers to be sworn, but if an Informer be not sworn, 'tis but a neglect in the Officer: The Proceedings are notwithstanding sufficient,

ficient, Mo. 447. where 21 H. 8. appoints the Enrolments of Dispensations in Chancery; yet if not done, it does not invalidate the Dispensation.

Thirdly, The Distress was resolved to be well taken being in the King's Case; for an Act of Parliament shall be expounded according to the Reason of the Law in such Cases.

Note. Livesay, the Secondary, craved the Opinion of the Court, whether he should pay treble Costs in this Case? For the Act of 14 gives treble Costs where any Person is prosecuted, for what he should do in execution of that Act, &c. which Act appointed the Constables, &c. to collect and execute the Act. But now by virtue of the subsequent Acts for the Chimney-Money; the Collection, &c. is by other Persons, and the doubt is, Whether they can have treble Costs by the Act of 13 and 14. Ch. J. Jones's Rep. 85.

But the Attorney General, who was of Counsel with the Defendant said, he would not insist upon treble Costs at this time, because this Cause was brought on by Consent, for the determination of the doubt about new empty Houses paying, but desired that it might be without prejudice.

*Baker versus Baker.*

**A** Prohibition to the Delegates. The Case was, That Administration had been granted to the Wife, upon which an Appeal was brought by the Mother of the Intestate, upon this Allegation, (inter alia) That the Wife had covenanted, that she would not intermeddle in the Administration, in regard she had been otherwise sufficiently provided for; for it was said, that the Ecclesiastical Judges had not to do with such matter. But it was objected on the other side, That it fell incidently into the principal matter whereof they had Cognizance, but they might be prohibited, if they judged the effect of it contrary to our Law; neither did it appear, that the Delegates would admit of this Allegation, and there were no Precedents for a Prohibition quia timeret. 3 Keb. 759, 783, 858.

But on the other side it was said, That there would go a Commission out to examine this matter of course before the Judges Delegates should sit to hear the merits of the case, and that would take up so much time, that many of the Goods being bona peritura, would be lost, (but note, the Ecclesiastical Judges may provide for the disposition of them, in case of such necessity, pendente lite.) And the Court granted the Prohibition quoad that Allegation only.

Anonymus.



Tothil *versus* Ingram.1 Mod. R.  
216.

2 Mod. 281.

3 Lev. 210.

3 Keb. 785,

829.

1 Lev. 100.

**I**N Replevin the Defendant avowed for an Periot, and Arrears of Rent upon a Lease.

In bar of this Avowry, as to the Periot the Plaintiff pleaded, That in a former Replevin brought by him against J. S. the said J. S. made Conulance as Bailiff to the Defendant, for the same Periot, and was barred: And to the rest he pleaded a Release of all demands, made unto him by the Avowant before this Rent accrued, and to this the Avowant demurred;

First, For that he doth not shew, that he which made Conulance was Bailiff to the now Avowant, for he might make Conulance without his Privy; and if so, it could be no bar to him now.

1 Sid. 141.

As to the Release it was said, That a Rent incident to a Reversion would not be barred by such Release: And so it was adjudged in this Court, in Hen and Hampson's Case, in the Year 1662. by Foster Chief Justice, Wyndham and Mallet, against the Opinion of Twifden, who now said that that Resolution was contrary to Littl. Sect. 510. who saith, That a Release of all demands will extinguish a Rent-service. And it was said, That in Hancock and Field's Case, 2 Cro. 170. it was adjudged, That such Release will extinguish a Rent reserved upon a Lease, tho' not a Covenant before it be broken.

1 Lev. 100.

1 Mod. 99.

To which it was answered, That in Witton and Bye's Case, 2 Cro. 486. it is resolved, That if a Lessee assigns over his Term reserving a Rent, it will be extinguished by releasing of all Demands. But Houghton makes a difference between such a Rent, and a Rent incident to a Reversion.

For the first Point the Court held, That if the Bailiff had no Authority to make Conulance, it ought to be shewn on the Avowant's part; for otherwise it shall be intended; and this may be traversed by the Avowant here, tho' the Plaintiff in Replevin, when Conulance is made, cannot traverse the being Bailiff.

But for the second Point, adjournatur.

Sir Walter Plomer *versus* Sir Jeremy Whitchcot.

1 Lev. 158.

Ch. J. Jones,

60, 61.

2 Mod. 119.

3 Keb. 591,

656, &amp;c.

**T**HE Court were this Term to give their Opinions in the grand Point, (viz.) Whether Sir Jeremy Whitchcot, Warden of the Fleet, were liable for Escapes suffered by Duckenfeild his Lessee; Duckenfeild being insufficient. But the whole Court observing an imperfection in the Verdict, which found that Duckenfeild was insufficient when put in, and at the time of his Escape, but it was not found that he was so at the time of the Action brought; hereupon they declared, That they were all agreed, that Sir Jeremy

Whitchcot

Whitchcot was liable, if the said matter had been found, but that they could not give Judgment upon the Verdict as it was found; whereupon the Parties were permitted to take a Venire facias de novo, but they rather chose to have a Nil capiat, &c. entered, and so bring a Writ of Error; for their Counsel were very strong, that that matter should be intended in a Special Verdict, and their Declaration did alledge him to be insufficient at the time of the Asson brought. But Sir Jeremy Whitchcot soon after died, and so the Writ of Error did not proceed.

*Ent. versus Withers.*

**I**n Debt against an Executor, suggesting a Devastavit, and to charge him in his own Right.

The Defendant pleaded a frivolous Plea; to which it was demurred; but then Exception was taken to the Declaration, That it did not set forth any Judgment obtained before, against the Executor de bonis testatoris, without which this Asson would not lie in this manner. Vid. Wheatly and Lane, Hill. 26 & 21 Car. 2. in Saunders. And of that Opinion were the Court; but Serjeant Pemberton desiring to argue it, saying there was no difference in reason between the Cases, adjournatur.

2 Lev. 209.  
3 Keb. 797,  
825.  
1 Lev. 14,  
255.  
2 Lev. 45.  
Postea 321.  
3 Keb. 735.  
1 Saund. 216.  
1 Sid. 397.

*Anonymus.*

The Court said, That in case of an Indisment and Issue joined, the Party could not carry it down to try it by Proviso, for it lay not against the King.

*Astree versus Ballard.*

The case was, The Plaintiff had recovered against two in Crover, and now brought a Scire facias against the Bail; who pleaded, That he had taken one of the Principals in Execution, before the Scire facias taken out. 1 Ro. 897. If one hath Execution against the Principal, he cannot afterwards proceed against the Bail, nec econtra. But Paschæ 28. of this King it was resolved in the Case of Orlibary and Norris, where the Bail was taken first in Execution, and afterwards the Principal, that they should be both detained until satisfaction, contrary to 1 Ro. 897. So that it appears, that the Plaintiff shall not be concluded by his Election to proceed against the one first. But here the difficulty is, that the Bail by the Plaintiff's act is disabled to bring in both their Bodies according to the Condition of their Recognizance, he having taken one of them himself. Et adjournatur.

2 Lev. 195.  
2 Mod. 312.  
1 Sid. 107.  
T. Jones 75.  
3 Keb. 709,  
723, 701,  
765, 766,  
776.

R t

Smith



Smith *versus* Tracy.

Ante 307.  
Postea 323.  
2 Vent. 317.  
1 Lev. 173.  
Sir T. Jones  
93.  
3 Keb. 669,  
730, 776,  
806, 831.

**I**n a Prohibition the case was, Eliz. Smith died Intestate, leaving two Brothers, one of the whole Blood, and the other of the half Blood. And in the Ecclesiastical Court, they would admit the half Blood to come in for distribution with the whole Blood, upon the Aa of 22 and 23 Car. 2. cap. 16. Upon which a Prohibition was granted, to which there was a Demurrer. And the Question came upon these Words in the Aa, (viz. That distribution is to be made to the next of Kin of the Intestate, who are in equal degree, and such as legally represent them.

For the Plaintiff it was said, That Statutes were to be expounded by the reason of the Common Law, which took no consideration of the half Blood; insomuch that an Estate should rather escheat then descend to the half Blood: Then the Words of the Aa are, such as legally represent them, which they both do the common Ancestor, but not one another. In this case Consideration is to be had of the intent of the Intestate, which must be supposed to prefer the Brother of the whole Blood. Dyer 372. Isted's Case, where the Executor dies Intestate, the Residuary Legatee of the first Testator shall have Administration, and not the next of Kin, because that is suitable to the Intent.

On the contrary it was argued, That altho' the half Blood be rejected in descents; yet it is regarded in other Cases. 3 Co. in Ratcliff's Case, the half Blood may be Guardian in Socage. Vid. 2 Ro. 303. and Style's Rep. 74, 75. for granting of Administrations to the half Blood; there cannot be two degrees made of the whole Blood, and the half Blood; neither does our Law make any distinction, but when it wholly excludes them.

Curia. The intent of this Aa was, to give the Ecclesiastical Court the Jurisdiction in this matter, and to provide for the distribution of Intestates Estates; which they had a long time attempted and contested, but were still prohibited, but now this Aa permits them to proceed; and it were fit we should be informed, what their Course is and has been, and therefore let us hear the Civilians as to this point. Post. 323.

## The King and Marlow.

3 Keb. 736.

**T**he Defendant, being a Printer, was indicted for his second Offence, for Printing of a Seditious Book contrary to the Aa of 14 Car. 2. cap. 33. and being found Guilty at the Sessions of the Old Bailey, the Judgment was given, That he should be for ever disabled to exercise the Art or Mystery of Printing, and pay 20 l. Fine, and to stand in the Pillory; And a Writ of Error was brought

brought, and Errors were assigned in the Judgment, as varying from the Words of the Aa. For,

First, The Aa is, That he should be disabled to exercise the Art and Mystery of Printing or Founding of Letters: And the Judgment is only to disable him from Printing.

Secondly, The Aa is, That he shall receive such further punishment by Fine, Imprisonment, or other Corporal Punishment: And the Judgment is, both for Fine and Corporal Punishment, when it ought not to be for both.

Curia. The first is, as it should be; for Printing and Founding of Letters are two distinct Trades; and the Words are to be taken respectively to such Trade as the Defendant is of.

Again, 'tis a Rule, That a Man shall not assign an Error in that which is for his advantage.

But the second was held an Error, for that the Aa did not intend a Fine and Corporal Punishment both, and therefore the Judgment was reversed.

Termino Sancti Michaelis, Anno 29 Car. II.

In Banco Regis.

Davis *versus* Price.

**I**n Error upon a Judgment in the Common Bench in an Action of Trover, where Judgment was given by default.

3 Keb 693,  
694

The Error was assigned in the Declaration, which was de decem Juvencis (Anglice. Bullocks and Heifers,) and not said how many of one and of the other.

But it was answered, That the Latine Word being proper and of known signification, the Anglice was void, according to Osborn's Case, 10 Co. But the Court reversed the Judgment, and cited the Case before in this Court, Trover de viginti ovibus matricibus & agnis: And it was resolved to be naught, for not ascertaining the number of each. But Twisden said, There was a Trover brought de viginti averiis, (viz.) bobus, agnis. &c. and viginti was applied to each Species, and held well. It was offered in this case, to distinguish it from the case de ovibus matricibus & agnis, that there the Latine was of two sorts; Sed non allocatur, for the Words here being Equivocal it was all one.



## Dutton &amp; Uxor versus Pool.

3 Keb. 786,  
814, &c.  
Ch. Just.  
Jones 102.  
Postea 332.  
Ante 6, 7.  
2 Lev. 210.  
3 Lev. 139.

**I**n Assumpsit, the Plaintiff declared, That his Wife's Father being seized of certain Lands now descended to the Defendant, and being about to cut a Thousand pounds worth of Timber off from the said Lands, to raise a Portion for his said Daughter; the Defendant promised to the Father, in Consideration that he would forbear to sell the Timber, that he would pay the said Daughter 1000 l.

Raym. 302.  
T. Jones 103.

After Verdict, upon Non Assumpsit, for the Plaintiff, it was moved in Arrest of Judgment, That the Father ought to have brought this Action, and not the Husband and Wife; and there was a Case shewn to be adjudged in the Common Bench, Hillary 23 and 24 Car. 2. Rot. 1538. between Pine and Norris, where the Son promised the Father, That in Consideration that he would surrender a Copyhold to him, that he would pay a certain Sum to his Sister, for which she brought the Action, and then held that it would lie for none but the Father; for where the Party to whom the Promise is to be performed, is not concerned in the meritorious cause of it, he cannot bring the Action, But if a Promise were to a Man, that if his Daughter should marry his Son, he would give her 1000 l. there, because the Daughter does the Act, which is the Consideration, she may bring the Action.

On the contrary, the Case was cited, 1 Roll. 32. Starkey and Miln, where, in Consideration of certain Goods sold, the Promise was to pay part of the Money to another, there that other might bring the Action, And it differs from the Case where Money is delivered to A. to pay over to B. B. may bring Debt. Yelv. 24. If the Father had in the Case at Bar cut the Trees, and the Son had said, Let me have the Trees, and I will pay the Daughter so much, that had been the same with the Case before cited, 1 Roll. and it doth not seem to differ, as it is 1 Cro. 163. Rookwood's Case, where the Father being about to charge the Land with a Rent of 4 l. per Annum to his Younger Sons, the Eldest promised, That if he would forbear to charge the Land, he would pay the 4 l. per Annum, and the Sons upon this brought the Assumpsit, and recovered (Sed vide librum, that Promise is said expressly to be made to the Sons who were present.) Vid. 1 Cro. 619, 652. Lever and Haw's Case, where the Promise was made to a Man, in Consideration, that he had agreed that his Son should marry his Daughter, and to settle such a Jointure upon her, that he would give the Son 200 l. with her; and for this the Father brought the Action, and held well brought, tho' the Court seemed to incline, that the Son might also have brought it. And the Court here inclined for the Plaintiffs. Sed adjournatur. Post. 332.

Saunders *versus* Williams.

**I**N an Action upon the Case, the Plaintiff declared, That he was seised in Fee of one Acre, and possessed for a certain number of Years in another Acre, and had a Common in Black-acre for Beasts levant and couchant thereupon, and that the Defendant put his Beasts in the place, and disturbed him.

The Defendant pleaded a Title of Common to himself also there. Upon which Issue was joined, and found for the Plaintiff; and it was now moved in Arrest of Judgment, That the Plaintiff had made no Title to the Common by Prescription or otherwise.

Sed non allocatur: The Defendant being a Wrong-doer: And the same matter was adjudged in the Court between St. John and Moody, Mich. 27 Car. 2. quod vide ante, and in the 2 Cro. 43; 122. & 3 Cro. 500.

Robinson *versus* Woolly.

**T**he case was this Term argued again: And Holt argued, That the Induction, tho' executed by the Archdeacon after the new Bishop was consecrated, was sufficient.

The Bishop is only to admit and institute, and to send a Mandate to the Archdeacon to induct, who is to do it de communi Jure; and therefore if the Bishop hath admitted and instituted, and made a Mandate for Induction, 'tis a sufficient Excuse for him in a Quare impedit; (11 H. 4. 9.) for a Bishop is merely a Spiritual Officer. A Prebendary is to be inducted by the Dean and Chapter, Pl. Com 529.

But 'tis objected, That the Archdeacon does not induct ex Officio, but a Mandate from the Archbishop is requisite; (scilicet)

First, The Mandate is to intimate to him, That the Party is instituted.

Secondly, To oblige the Archdeacon to induct, under the penalty of an Ecclesiastical Censure.

But if it be granted, That the Archdeacon's Authority in this matter is only derivative; yet that being executed (by the Mandate) quoad the Guardian of the Spiritualities, what remains to be done, remains only to the Archdeacon, who shall finish what hath proceeded so far already. If a Venire be awarded to the Coroners, because of Kindred in the Sheriff's Family; tho' a new Sheriff comes in before it be returned, yet the Coronet shall proceed in the Execution thereof. The Sheriff seized Goods by a Fieri facias, and before they were sold a new Sheriff was made, and then he sold them, and it was resolved that the Sale was good, in the 2 Cro. 73. Ayre and Aden's Case.

3 Keb. 820  
St. John and  
Moody, Ante  
274, 275.  
Infra 356.  
2 Vent. 138,  
139, 185,  
186, 288,  
289, 292.  
T. Jones 48.

Ante 309.  
Ch. Just.  
Jones, 78.  
2 Lev. 199.  
3 Keb. 747,  
773, 821.

Sed



(Sed nota, the Court said, That if the old Sheriff had returned, That the Goods had remained in his Hands pro defectu emptorum, a Distringas should have gone to have them delivered to the new Sheriff, and then a Venditioni exponas should have gone to the new Sheriff. Vid. Yelv. 44.)

In the 2 Cro. 48. the Executors of the Bishop of Carlisle were admitted to proceed in a Suit commenced by the Testator in the Ecclesiastical Court, because the Suit was well commenced, and the Court were possessed of the Cause: Where Commissioners of Oyer and Terminer have given Judgment, and a new Commission granted which determines the old; yet the former Judgment may be executed, Bro. tit. Commission 13. So by the Sitting of the King's Bench, the Commission at the Old Bailey, being in the same County, is superseded, and yet Execution is done in Term time.

But the Court said, That was by the Statute of 2 E. 6.

Again, Induction is but a formality, and therefore shall not be so strictly examined. Where the Queen granted to two the Stewardship of a Manor, it was held, That Admission by one of them was sufficient. Mo. 107. Noy's Reports, (Quære that Case) the Archdeacon having received a Mandate for Induction, makes a Precept omnibus literatis infra Archidiaconatum to induce, and a Clerk who did not belong to the Archdeaconry made the Induction; and this was held to be well enough.

Saunders contra. The only Question is, Whether the Archdeacon induces by his own Authority, or derivative from the Bishop: For if by the latter, then the Induction cannot be good.

'Tis clear, That the Archdeacon is but Minister Episcopi, and in his Precept to those of the Clergy to execute, he does as a Sheriff doth, who in his Precept to his Bailiffs, recites his Mandate. If the Sheriff makes Execution after the King's Death, if he hath notice thereof he is excused in Trespass; but the Execution shall be avoided. It appears by the making of the Statute of 2 E. 6. of executing Judgments given by Commissioners after such time as the Commission is expired, is a great Doubt; and yet there the thing was executed in a great part: But here 'tis but one single Act, whereof no part was done before the new Bishop was made. In Sir Randolph Crew's Case in the 3 Cro. 97. it appears, that Commissioners to examine Witnesses could not proceed after notice of the Demise of the King.

But here 'tis objected, That the Verdict finds that the Archdeacon had no Notice.

I answer, That the Consecration of a Bishop is a publick and notorious Act.

And all the Court were of Opinion, That the Induration was wholly void, and gave Judgment for Woolly the Defendant, and said, It was a Ministerial Act in jure Episcopi, and like a Letter of Attorney to deliver Seisin, which cannot be executed but in the Life of him that made it. Ante 309.

Quære, Whether this Judgment was not afterward reversed in the Exchequer-Chamber.

Ent *versus* Withers.

*It was afterwards Reversed in the Exchequer-Chamber. Ch. Just. Jones f. 79.*

The Case was, Debt against the Executor upon a Bond of the Testator, and it was brought in the Debet and Detinet, suggesting a Devastavit in the Executor.

The Defendant demurred: For altho' such Action will lie, if there has been a Judgment against the Executor, yet no such Action has been upon a Bond; and 'tis hard upon such a Surmise to charge the Executor in his own Right.

But on the other side it was said, That this differs not in Reason from the Case of a Judgment, and upon Nil debet the whole Matter shall be brought in Question; as whether the Bond was sealed, &c? And in a Case between Merchant and Driver, tried at Guild-Hall before my Lord Hale, where it was brought as this; because the Plaintiff could prove no actual Wasting (as is necessary in this Case) he was nonsuited. But Hale took no Exception to the Action.

But the Court said, That they would extend these Actions no further than they had been already resolved; and they would not agree, that an Executor should be held to Bail upon a surmise of a Devastavit, and so Judgment was given for the Defendant. Ante 315.

*Ante 315. 2 Lev. 209. 3 Keb. 797, 825. 1 Lev. 147, 255, 256. 2 Lev. 145, 209, 825.*

*Postea 255. contra.*

Pierce *versus* Win.

ERROr out of the Grand Sessions of Wales: The Case upon a Special Verdict was thus;

A Devise to one and to the Heirs Males of his Body, with a Proviso, That if he does attempt to alien, then immediately his Estate shall cease, and another shall enter.

The Devisee in Tail made a Feoffment, and he in Remainder entred, and Judgment was given in the Grand Sessions for the feoffee against him in Remainder.

And the Errors were assigned in the Matter in Law: And to maintain the Errors it was said, That it must be agreed of all hands, that a Tenant in Tail could not be restrained from Alien- ing by Fine or Recovery; and also, That in this Case a bare At- tempt would be no Breach, according to Corber's and Sir A. Mild- may's Case, &c. And also, That a Tenant in Tail might be restrained to alien by Feoffment or other Act which was tortious,

*3 Keb. 787.*



and would make a Discontinuance; and here this Proviso imports as much; and therefore the Feoffment will be a Breach; for that is an Attempt and more. For,

First, In Considerances, the Intention of the Words of a Condition and the Substance is regarded, and the Form of the Words not so precisely followed. As a Feoffment upon Condition, That the Feoffee shall give the Land in Frank-marriage with the Daughter of the Feoffor: This cannot be strictly pursued; yet the Feoffee must make a Gift as near as may be. Co. 1 Inst. 217. So upon Condition to give the Land to a Layman in Frank-almoign: But this Rule holds especially in Wills, where the Intent is chiefly looked upon. A Devise of all his Rents will pass Reversions upon Leases, and tho' the Words be here, Proviso, if he does attempt to alien: As much as to say, Proviso, if he doth alien, &c.

Secondly, Whether the Feoffment shall determine the Estate quasi by Limitation, so that the Remainder-man shall take immediately by Executory Devise: and that is very clear. For tho' in *M. Portington's Case* in 10 Co. it is said, That the Words Condition shall not in a Will be taken as a Limitation; yet the Current of the Authorities since are otherwise.

Ante 200.

But here the Court held the Condition void; for a Man cannot be restrained from an Attempt to alien: For non constat what shall be judged an Attempt, and how can it be tried? And when the express Words are so, there shall not be made another sort of Condition than the Will imports. And so the Judgment was affirmed.

*Osborn versus Beverham.*

3 Keb. 800.  
810, 828.  
2 Lev. 209.

**D**Ebt for Rent, incurred at two half Years.

As to one of them the Defendant pleaded non debet. And as to the other, Actio non; because he says, he was ready to pay it at the Day and Place, and has been ever since; & profert in Cur' the Rent, ideo petit Judicium de damnis. To which the Plaintiff demurred.

For that he did not say, quod obrulit; for where the Time and Place of Payment is certain, Semper paratus is no Plea without an Obrulit.

Raym. 419.

For the Defendant it was said, That the Plaintiff ought to reply to a Demand, 1 Inst. 34. 'Tis a good Plea for the Defendant to save his Damages to say, That he was always ready. *Rastal's Entries* 159. Semper paratus is pleaded without an Obrulit. So 1 Roll. 573. no mention of a Tender.

Ante 252.

But then another Fault was found, That it was pleaded in Bar, whereas it ought to have been only in Bar of Damages, and not to the Action; and this was agreed to be fatal.

But the Court held the Plea to be naught for the other Cause also.

Smartel and Scholler

**I**n an Ejedment upon a Special Verdict, the Case was :

A Man devised his Land to J. S. after the Death of his Wife. And after Argument the whole Court were of Opinion, That J. S. not being Heir to the Devisor, there should go no implied Estate to the Wife; for an Heir shall not be defeated, but by a necessary Implication. Post. 376.

Vaugh. 262, 264.  
T. Jones 98, 265, 6, 7.  
2 Cro. 75.  
3 Keb. 816, 832.  
Postea 376.  
1 Sid. 191.  
Raym. 453, 454.  
1. Jones 84.  
3 Keb. 805, 812, 841.  
2 Lev. 20.

Frowd and Frowd.

**A**n Action for Words; for that the Defendant said of the Plaintiff, He would have given Dean Money to have robbed Golling's House, and he did rob the House.

After Verdict, it was moved in Arrest of Judgment, That the first part of the Words import only an Inclination, and not that he did give any Money: And the Words, He did rob the House, shall be referred to Dean as the last antecedent, and not the Plaintiff.

But the Court were of Opinion for the Plaintiff, as was adjudged where the Words were, He lay in wait to rob. Vid. Cockain's Case in the 1 Cro. and in the 4 Co. And the Court said, That the Words might be construed, That the Plaintiff offered Dean Money, and he refusing it, that the Plaintiff robbed the House himself.

Smith *versus* Tracy.

**T**he Case being moved again, the Opinion of the whole Court was, That the half Blood should come in for Distribution upon the new Act; For as to the granting of Administration, the being of Guardian, &c. the half Blood may be taken nearer of Kin, than a more remote Kinsman of the whole Blood. Mo. 635. Ro. Rep. 114. Ante 307, 316.

Ante 307, 316.  
Molloy 316.  
2 Ventr. 317.  
2 Lev. 173.  
Sir T. Jones 93.  
3 Keb. 669, 730, 776, 831.

J —'s Case.

**J** Brings his Habeas Corpus: The Return was, That he was committed by J. S. J. N. T. K. (to whom, and others, a Commission of Bankrupt was awarded) for refusing to answer a Question put to him concerning the Bankrupt's Estate, &c. and so Commisus fuit in custodia by a Warrant to the Officer Virtute Commissionis predictæ, & hæc est causa captionis seu detentionis. &c.

The Counsel for the Prisoner took three Exceptions to the Return.

S i

First,



First, For that there did not appear a sufficient Authority: For the Commission is said to be granted to them and others, and then they could not act without the rest; for the Return does not express any Quorum, &c. in the Commission.

Secondly, Instead of Commissus in Custodia, it ought to be Capus, for that is the usual Form: For this is, as if the Commitment were by the Officer that makes the Return.

Thirdly, *Hæc est causa captionis seu detentionis*, is uncertain; for it ought to be & detentionis.

And upon the first and last Exception, the Prisoner was discharged by the Court; but at the same time was told by the Court, That he must answer directly to such Questions as were put to him, in order to the discovery of the Bankrupt's Estate, or else he was liable to be committed.

## Termino Sancti Hillarii, Anno 29 & 30 Car. II.

### In Banco Regis.

#### Harrington's Case.

3 Keb. 841.

**A**N Information was presented against him, for that he maliciously and traitorously intending to stir up Sedition, and to create a Disturbance between the King and his People, upon a Discourse of the late Rebellion and those Persons which were executed at Charing-cross for the Murder of the late King, in præsentia & auditu quamplur: utteravit & propalavit hæc verba perniciosa sequentia, (viz.) Gubernatio nostra consistebat de tribus Statibus, & si eveniret Rebellio in Regno, nisi foret Rebellio contra omnes Status, non est Rebellio.

Upon Not Guilty pleaded, he was found Guilty of speaking the precedent Words, and not Guilty as to other Words contained in the Information.

It was moved in Arrest of Judgment, That Gubernatio signified the Exercise and Administration of the Government, and not the State of it, which Regimen doth.

Again, That it was Consistebat, and so might relate to the Britons or Saxons time, or to the late mutations of the Form of Government amongst us, and that to put the Words in Latine (without an Anglice) was not to be allowed; for the Translation might either aggravate or mitigate the Sense; and that such a Precedent might be prejudicial as well to the King, as the Defendant.

I

But

But those Exceptions finding little Weight with the Court, his Counsel proceeded to justify, or at least to extenuate the Words, alledging, That the Relation was so great between the King and People, that to raise a Rebellion against the King must also affect the other States, and this, whether the King be taken (as some would have it) as one of the three Estates; or (as others) that the Lords Spiritual and Temporal make two of the Estates, and the Commons the third, and the King as Chief and Head of all, as is the Statute of 1 Eliz. cap. 3. where the Lords and Commons call themselves the Queen's Obedient Subjects, representing the three Estates of the Realm of England, and so is the 4 Inst. 1.

But the Court supposing that the Words did tend to set on foot that Position upon which the War (levied in 1641 by the two Houses against the King) was grounded, were much displeased, that the Counsel would pretend to defend them, or put any tolerable Sense upon them.

It was also insisted upon by the King's Counsel, and agreed by the Court, That the ancient Precedents, and many later also, were used to express the Words in Latine, and this pursuant to the Statute of E. 3. which requires, that their legal Proceedings should be in Latine; and if the Words were not so elegant, yet they would serve in an Information. &c. where 'tis rather chosen to put in Words agreeable to the phrase of the Law, than to Tully's Orations.

And so the Court (Wylde being absent) delivered their Opinions for the King; but took time to set the fine, and immediately committed the Defendant (who before was upon Bail) as the course is when Judgment is given, altho' no fine was set. Post. 327.

Anonymus.

**I**t was said by the Court upon an Indisment against one for refusing to take an Apprentice bound by the Church-wardens and a Justice of Peace according to 43 Eliz. that in such case a Man cannot be compelled to accept an Apprentice.

3 Mod. 271.  
1 Lev. 84.  
Raym. 66,  
177.  
1 Sid. 99.

Paget *versus* Dr. Vossius.

**T**Rin. 26 Car. 2. Rot. 583. In an Ejectment upon a Special Verdict the Case appeared to be thus:  
Dr. Brown by Will devised certain Lands to Dr. Vossius, the Defendant, (a Dutchman) during his Exile from his Country; and if it should please God to restore him to his Country, or that he should die, that then the Lands should go to the Lady Mary Heveningham in Fee, who was the Lessor of the Plaintiff.

2 Lev. 191.  
Jones Ch.  
Just. 73.  
2 Mod. 223.  
3 Keb. 638,  
749.



It was found, That at the time of making the Will, and the Death of Dr. Brown, there was War between England and the Spanes General, and that the Doctor was fallen into Displeasure with the States, and that they had taken a Pension from him of 140 l. per annum, and that by reason thereof he came over: But did not find that he was exiled by any Act of State, and that the War was now ceas'd, and that the Doctor might return, if he pleased; but it did not find that they had restored him to his Pension.

After divers Arguments on both Sides this Term, Judgment was given for the Defendant by the whole Court.

For they said, There was a Voluntary and Compulsory Exile, and in regard he was not exiled by any publick Edict, the Will must be understood of a voluntary absence from his Country: And the Jury found, That those matters which drove him away did still continue, (viz.) The depriving him of his Pension.

Nora, Exilium is a Word known in our Law, (viz.) When Gallies, by hard Usage, are constrained to depart from the Harour.

And if it be objected, That this durante Exilio is a void Limitation, as being of unknown sense in our Law, 'tis still against the Lesson of the Plaintiff, and then she cannot claim until the Doctor's Death, and in the mean time the Descent must be to the Heir at Law. Exilium, quasi ex solo; that is, as if it had been said, During his absence from his Country.

#### The King versus Plume.

2 Lev. 286.  
3 Keb. 816,  
843.  
Postea 346.

HE was indicted upon the Statute of the 5th of the Queen for that he had set up, used and exercised artem mysterium five manual. occupationem Pomarii, Anglice, of a Fruiterer, being a Trade, Mystery, or manual Occupation used in this Kingdom, the 1st day of January, Anno Eliz. 5. in which Trade the said Plume was not brought up by the Space of seven Years, &c. And to this the Defendant demurred.

For that it hath been held, That the Statute extends not to every Trade, but to such an one as requires Art and Skill, and therefore not to a Hemp-dresser, as in the 1 Cro. so in 2 Bullstrode 188. nor to Pippin-monger, as in 1 Roll. Rep. 10. And so a Gardiner hath been resolved not to be within the Act. In the 14th of this King, the Indictment was for the Trade of a Barber, but no Judgment given; (but others said, That in that case Judgment was for the King.)

On the other side it was said, That the Question here is not of those which sell Apples in Stalls; but the Trade of a Fruiterer is well known, and they are incorporated in London, and there requires much

much Skill in sorting of Fruit, and in judging the durableness thereof.

But the Court inclined for the Defendant. But being informed by the Counsel for the King, that there were many Precedents, it was adjourned. Post. 346.

#### Harrington's Case.

**H**arrington was again brought up, and the Court fined him a Thousand pounds, and awarded that he should recant the Words in such Words as the Court should direct, and to find Sureties for his Good Behaviour for seven Years; after which he produced a Writ of Error returnable before the Lords then sitting in Parliament, and prayed that it might be allowed, and that he might be admitted to Bail.

The Court said, That they allowed the Writ, but would advise whether they should bail him or no, and so remanded him to Prison.

Anonymus.

**I**n an Assault, Battery and Wounding, the Plaintiff after Verdict moved the Court for an increase of Damages; the Court said they could not do it, if the Word Maihemavit was not in the Declaration.

#### Clark's Case.

**U**pon an Habeas Corpus to the Mayor, &c. of London, a Custom was returned to disfranchise, and commit a Freeman for speaking opprobrious Words of an Alderman.

The Court said, They might fine in such Case, but the other Custom would not hold, notwithstanding the Act of Confirmation of their Customs.

3 Keb. 764,  
799, 811.  
Ante 302.  
2 Lev. 200.

Termino



Termino Paschæ, Anno 29 Car. II.

In Banco Regis.

Anonymus.

Ante 93.  
2 Mod. 66.  
2 Vent. 29.

**I**N Trespass of Battery by Baron and Feme, for beating of them both.

Upon Not Guilty, the Verdict was for so much Damage for beating the Husband, and so much for beating of the Wife.

The Court said upon a motion to arrest the Judgment, That the Plaintiff might release the Damages for beating of himself, and take Judgment for the other.

The King *versus* Mead.

**A**N Information was brought against him, upon the Statute of 17 Car. 2. which restrains Non-conformist Ministers from inhabiting within five miles of any City, Town-Corporate or Borough, that sends Burgeses to Parliament, &c.

After Verdict for the King, it was moved in Arrest of Judgment.

First, That the place of his Habitation was alledged to be within five miles of London; but it was said, That London sent Burgeses to Parliament, which not being in the Record, the Judges were not to take knowledge of. Sed non allocatur;

For the last Words of sending Burgeses to Parliament shall be referred only to Boroughs; and therefore the Act restrains them from dwelling in Corporations, &c. tho' such Corporations as send no Burgeses.

Secondly, It is alledged, That the Town where the Defendant dwells is within five miles; but not that the place of his Habitation in that Town was so, and therefore may be intended to be more remote.

Thirdly, There wants vi & Armis. Sed non allocatur, sed Judicium pro Rege.

Termino Sanctæ Trinitatis, Anno 30 Car. II.

In Banco Regis.

**M**emorandum, This Term Sir Richard Rainsford was removed, and Sir William Scrogs, one of the Justices of the Common Pleas, was made Lord Chief Justice of the King's Bench.

Hovel and Reynolds.

**I**N Trespass for Fishing in his several Piscary, and for taking <sup>T. Jones 109.</sup> 20 Bushels of Oysters there such a Day, continuando piscationem prædictam from the said Day to the time of the Action brought.

Upon Not Guilty pleaded, and a Verdict for the Plaintiff, it was <sup>Ante 271.</sup> moved in Arrest of Judgment, That the fishing in the continuando was altogether incertain, not expressing the Quantity or Quality of the Fishes as it ought, according to Playter's Case, 5 Co. and of this Opinion were Wylde and Jones.

But the Chief Justice inclined to think it well enough, and said Playter's Case had not been very well approved of late Years, and that is, that 'tis necessary to express the kind of the Fishes, which has been held since needless; and he knew not why it might not be, as well as an indebitatus Assumpsit pro diversis mercimoniis. But the other Judges said, tho' it was Reason it should be as the Chief Justice said, yet they knew not how to depart from the Authorities in the Point, and that Playter's Case had remained unshaken. Sed adjournatur.

Knight and Peachy and Freeman.

**I**N Debt for Rent against an Assignee of a Lessee.

The Defendant pleaded, That before the Action brought he <sup>T. Jones 109. Raym. 303.</sup> assigned over to J. S. and thereof gave Notice to the Plaintiff.

The Plaintiff replied, That he still kept the Possession, and had made the Assignment by Fraud to disappoint him, &c. To which it was demurred, for it was said, That Fraud was not averrable in this Case, neither by the Common Law nor any Statute.

But the Court inclined that it might, for if such a Practice <sup>Postea 331.</sup> should obtain, the Lessor might be hindered perpetually of his Action of Debt, by making Assignments to Persons unknown. An Executor confesses a Judgment, which is lawful for him to do; yet this may be averred to be entered or kept on foot by Fraud, and that  
by



by the Common Law which hates all frauds. Sed adjournatur.  
Postea 331.

[Anonymus.

Ante 212.

A Prohibition was prayed to the Counsel of the Marches, for that they proceeded upon an English Bill there against the Defendant; supposing that he had promised upon a Consideration to pay the Debt of a Stranger, because 'tis in the nature of an Action upon the Case, and consists merely in Damages. And altho' many Precedents were shewn of their Proceedings in such Actions, and the Statute of 34 H. 8. cap. 26. that they should determine such Cases as were heretofore accustomed and used, &c. as should be assigned to them by the King's Majesty; and it was pretended that this was within their Instructions; yet the Court granted the Prohibition: For where Damages are uncertain, they cannot be set in a Court of Equity but by a Jury. In Debt, because the demand is certain, the Courts here have sometimes assessed Damages without a Writ of Enquiry, but never in Trespass or Actions upon the Case, which lie wholly in Damages.

Anonymus.

Vid. Mo.  
839.

A Habeas Corpus, the Return was read and spoken to, and the Prisoner ordered to be remanded.

Twisden said, The Return should have been first filed, and the Prisoner committed to the Marshalsey, for otherwise the Court have no power over him, and he cited 1 H. 7. Humphry Stafford's Case, who being brought to the Bar upon an Habeas Corpus by the Lieutenant of the Tower, was committed to the Marshalsey, and afterwards remanded to the Tower; but the other Judges differed as to the Commitment, and said it was not necessary to keep the Prisoner in the Marshalsey until the Matter was determined, but he might be sent from time to time to the same Prison, and brought up by Rule of Court, until he is either bailed, discharged or remanded. And so they said it was lately done in the Earl of Shaftsbury's Case.

Gilmore *versus* Shuter. Pasch. 30 Car. 2. Ro. 465.

2 Lev. 227.  
Ch. Justice;  
Jones 108.

Upon a Special Verdict the Point was, Whether a Promise made upon such Consideration as by the Act of 29 Car. 2. to prevent Frauds and Perjuries, is requisite to be in Writing signed by the Party to be charged therewith, being made before the 24th of June last, but the Action brought after, be within the Restraint of the Act which saith, That from and after the 24th of June, no Action shall be brought upon such Promise, &c.

I

And

And it was resolved, That the Case was not within the Act, which did not extend to any Promise made before the 24th of June.

The King *versus* Sir Thomas Fanshaw.

SIR Thomas Fanshaw and others were indicted for not repairing of a Bridge, which it was alledged they were bound to repair <sup>3 Keb. 855</sup> Ratione Tenuræ of such Lands.

Sir Thomas Fanshaw pleaded, That he was not bound to repair Ratione Tenuræ, and found that he was.

In Arrest of Judgment it was said, That the Verdict was not pursuant to the Indictment; for therein 'tis alledged, that Sir Thomas Fanshaw and others were bound to repair Ratione Tenuræ, and the Verdict is, that Sir Thomas Fanshaw Ratione Tenuræ, &c. Reparare debet Parietem prædict' modo & forma prout per Indictamentum prædict' supponitur.

Sed non allocatur; For each of them may be bound to repair for their respective Lands, and they must get Contribution by the Writ de onerand' pro rata portione.

Secondly, It was said, that 'tis Ratione Tenuræ, and not said Sux, and this was said to be naught. Noy's Rep. 93.

Sed non allocatur; For the Precedents are generally so.

Parker's Case.

A Mandamus to restore an Attorney to his liberty of practising in a Court within the County Palatine of Chester was returned, That the Court was holden before the Chamberlain, Vice-Chamberlain, Baron, or the Deputy of the Baron, and that at a Court before the Baron's Deputy, he spoke contemptuous words of him, whereupon he suspended him from his Practice, & quod non aliter amotus fuit. Upon exceptions offered to the Return, The Court held it a good cause of Suspension, and ordered a Submission to him that received the affront in open Court, before that he should be restored. <sup>3 Mod. 334, 335; Raym. 56, 94; 1 Sid. 94, 152.</sup>

Anonymus.

The Case upon the Averment of Fraud, upon an Assignment by the Assignee of a Lessee was now moved again, and by Twisden, Wylde and Jones, against the Opinion of Scroggs Chief Justice, Judgment was given for the Plaintiff (viz.) That Fraud in such Case might be averred. <sup>Ante 229.</sup> Ante 229, 329.

C t

Anonymus.



Anonymus.

<sup>1</sup> Sid. 223. **I**N Ejectment, it was debated, Whether Confession of Lease, Entry and Duffer would serve, where there ought to have been an actual Entry upon the Title, as in the case of a Condition broken, or the like? And the Opinion of the Court inclined, That it would not, tho' my Lord Hale was said to be of another Opinion. Ante 248.

## Termino Sancti Michaelis, Anno 30 Car. II.

## In Banco Regis.

Dutton *versus* Poole.Ante 6, 7,  
318.

2 Lev. 210.

3 Lev. 139.

Sir T. Jones

122.

3 Keb. 786,

814, 830,

836.

Raym. 302.

**C**Ujus principium ante, Michael' 29 Car. 2. It was now moved again to stay the Judgment, by Saunders, who argued, That the Action could not be maintained by the Plaintiff; for the Father whose the Wood was, could only bring it; for it will be agreed he might have released it, or by cutting of the Wood, might have taken away all right of Action.

Again, It does not appear by the Record that the Defendant was here, and so no benefit by the forbearing to cut the Wood. Rookwood's Case cited on the other side, 1 Cro. 163. 1 Leonard 192. is, that the Promise was made to the younger Brothers, and the Consideration that they would consent; but here the Plaintiff who was to have the Money, had no share in the Consideration or meritorious Act; as where the Father promises J. S. if his Son will marry his Daughter he will give him 1000 l. the Son may bring the Action, because the Consideration moves from him, Healy's Rep. 20. the Case was to this effect, A Man promises a Woman whom he was to marry, upon a certain Consideration, That if he had a Son by her he should have a Term, (whereof the Woman was then possessed) and if it were a Daughter, she should have the Motety of the Goods, &c. they intermarry, and after the death of her husband, the Daughter born between them brings an Action against the Executor of the husband; and resolved, That it would not lie; tho' they did not think the Agreement made with the Wife, to be discharged by the Intermarriage, but only suspended, which is a Quære in my Lord Hobart; Yet the Daughter being no Party to the Promise, or to the Consideration, could not bring

Agreement not discharged by marriage  
but husband only

bring an Action. The Case of Norris and Pine before cited is stronger, for there he that made the Promise had a benefit, for it was in Consideration of Marriage.

On the other side it was said, That tho' it doth not appear that the Defendant was Heir, yet it may be intended after Verdict; however 'tis not nudum pactum, for if the Defendant had no benefit, yet there was a restraint upon the other, and that is Consideration enough. And for the objection of releasing, that holds; where J. S. promises J. N. if his Son will marry his Daughter he will pay him 1000 l. J. N. may release; but 'tis doubtful whether he can after Marriage, because then 'tis vested in the Son, as Scroggs Chief Justice said. 1 Roll. 31. The Uncle of an Infant delivered J. S. 12 l. who promised to pay the Infant when he came of Age, and the Action was well brought by him after his Age. So Goods sold to A. to pay 10 l. to B. B. may sue. Vid. 1 Roll. 32. Starkey and Mills.

The Court said, It might be another Case, if the Money had been to have been paid to a Stranger; but there is such a nearness of Relation between the Father and Child, and 'tis a kind of Debt to the Child to be provided for, that the Plaintiff is plainly concerned. And so by the Opinion of them all, (viz.) Scroggs, Wyld, Jones, and Dolben, Judicium pro Querente. Ante 318.

#### Anonymus.

A Prohibition was prayed to the Sheriffs Court of London; for that an Action was there commenced, to which the Defendant pleaded, That the cause of Action did not arise within the Jurisdiction, and offered to swear his Plea; but it was refused. The Counsel for the Plaintiff objected against the Prohibition, that the Plea came too late, for it was after an Impar lance. But it being proved by Affidavit, that the Plea was tendered within two days after the Declaration was delivered, and that immediately upon delivering the Declaration, there is an Impar lance of course, the Court granted the Prohibition, and said that the other side might demur if they thought fit; for the Liberty of the Subject was infringed by bringing him within a private Jurisdiction, when the matter arises out of it; and Attorneys in such places are sworn to advise no Plea to the Jurisdiction, nor that none shall be put in by them. Ante 88,  
180, 181.  
1 Mod. 63,  
81.  
2 Mod. 273.

And whereas 'twas said, That the Party had not prejudice, for he might remove his Case by Habeas Corpus;

To that the Court answered, Coming by Habeas Corpus Bail must be put in above, tho' the Cause otherwise did not require it.



Note, It appeared here, That there was no defence made in this cause to the Jurisdiction, and Co. Inst. was quoted, that defence should be made tho' not full defence: But the Court said, It was not necessary, and that Precedents were otherwise, especially where the Court have no Jurisdiction of the matter, otherwise where not of the Person.

James *versus* Richardson.

3 Keb. 832.  
Chief Just.  
Jones 99,  
100.  
2 Vent. 311.

2 Lev. 232.  
Raym. 330.

**I**N Ejectment, the Case upon a Special Verdict was thus; A. devised the Lands to B. and his Heirs during the Life of J. S. and after to the Heirs of the Body of R. D. now living, and to such other Heirs as should after be born; the Devisee for Life levied a Fine in the Life of him to whose Heirs the Remainder was limited, but he had a Son at the time of the death of the Testator. The question was, Whether it was a Contingent Remainder, the consequence whereof was to be destroyed by the Fine, or that it was vested in the Son? Scroggs, Chief Justice, Wylde and Jones held it a Remainder vested by reason of the words (now living) which was a sufficient Designation of the Person that was to take in a Will, tho' improper to call him Heir: But Dolben, contra, for by this Construction the Heirs, born after, are excluded, and the Son would take but an Estate for Life, tho' it were devised to the Heirs in the Plural Number.

T. Jones 99,  
100.  
Raym. 330.

Note, Upon a Writ of Error in the Exchequer-Chamber, this Judgment was reversed, Hill. 31. & 32. Car. 2.

Raym. 330.

Afterwards as the Lord Chief Justice Jones in the Margin of his Reports to this Case, fol. 99, 100. says, That this Case 1 Jac. 2. was brought into Parliament by a Writ of Error upon the Reversal in the Exchequer-Chamber; and the Reversal in the Exchequer-Chamber was reversed by the Parliament, and the Judgment given by the Court of King's Bench affirmed.

Termino Paschæ, Anno 31 Car. II.

In Banco Regis.

**A** Mandamus was prayed to the Ecclesiastical Court, to grant the Probat of a Will under Seal, &c.

The Case was, The Executor named in the Will, had taken the usual Oath, and then refused, (but after a Caveat entered) and another endeavoured to obtain Letters of Administration; the Executor came afterwards to desire the Will under Probat and contested the granting of Administration: Which was adjudged against him, supposing that he was bound by his Refusal.

And after an Appeal to the Delegates, this Mandamus was prayed, and granted by the Court; for having taken the Oath, he could not be admitted to refuse, and the Ecclesiastical Court had no further Authority, and the Caveat did not alter the Case.

Note, The Oath was taken before a Surrogate; yet it was all one.

Anonymus.

**A** Prohibition was prayed to a Suit for Tithes upon the Suggestion, that the Lands out of which they were demanded lay out of the Parish, and the Bounds of Parishes are triable at the Common Law. v. 20. 170.  
# 26. 274.

But the Court denied the Prohibition, because it did not appear, that a Plea thereof had been offered in the Ecclesiastical Court.

Anonymus.

**A** Prohibition was prayed to stay a Suit against J. S. Lessee of a Rectory, out of which a Pension was demanded. It was suggested, That the Lord Biron had three parts in four of this Rectory, upon which the Pension was chargeable, and that the Suit against one alone ought not to be, as in an Assize for a Rent-charge, all the Terre-Tenants are to be named, and here the Party has an Election to sue a Writ of Annuity, and if so, he must have named all that had been chargeable.

Curia. 'Tis true, in our Law it were a good Plea in Abatement; but perhaps their Law and Course is otherwise. And here they have Jurisdiction, and may proceed according to their own Rules; or if not, you may have an Appeal. Whereupon a Prohibition was denied. Ante 3,  
120, 265.  
2 Cro, 159,  
270.

Anonymus.



Anonymus.

**I**N an Habeas Corpus and Certiorari for the Body of J. S. who ha been imprisoned for not paying of a Fine of 20 l. set at the Quarter-Sessions, the return was, That he being Constable, and demanded by the Court to present an High-way, which was sworn before him by two Witnesses to be out of Repair, said in Contempt of the Court, That he would not present it: For which and certain other contemptuous words the Fine was set.

The Counsel for the Prisoner moved, that it might be filed: Which was done.

The Court were of Opinion, That the Fine was not well set; for Constables are to present upon their own Knowledge, and the two Witnesses should have been carried to the Grand Jury; for the Constable was not obliged to present upon their Testimony. This Court is to judge of their Fines, whether without Cause, or to mitigate them when excessively imposed; and for the contemptuous Words the Return is ill, because not expressed what.

On the other side it was prayed, That the Return might be amended, for he had spoken opprobrious Words; but that could not be admitted after the Filing. And so the Party was discharged.

Anonymus.

**I**T was moved to quash an Order of Sessions, for the keeping of a Bastard-Child.

First, That it doth not appear that the Child was born within the Parish.

Secondly, 'Tis to allow so much weekly until the Child is eight years of Age; whereas the Statute gives power to make a weekly Allowance while the Child shall be chargeable.

Thirdly, The Order was, at eight years old to pay 5 l. for the Binding of it out.

But the Court would not quash it; for they said it was implied, by saying, It would be chargeable to the Parish, that it was born there; and 'twas apparent it would continue chargeable for so long as they appointed the Allowance, and they might order 5 l. to be paid in the end.

Sed Quære, For a Sum in gross ought not to be set, but a weekly Allowance.

And the Court said, they must shew that respect to Justices of the Peace, who served the Country at their own charge, as not too nicely to examine their Orders. Ante 210.

Anonymus.

**E**rror upon a Judgment by Nihil dicit given in the Common Pleas, where the Asson was for Words, which in the Declaration were laid thus: That the Defendant said, Quidam J. S. (which was the Plaintiff's Name) innuendo the Plaintiff was, &c. The Error assigned was, That there was no Averment that these Words were spoke of the Plaintiff, for there might be more of the name.

But Hole for the Defendant said, The Innuendo would help that fault; and he cited the Case of Robotham and Venlecke in the 3 Cro. 378. where the Plaintiff declared, That he had made an Oath before a Judge upon certain Articles exhibited for the Good Behaviour; and the Defendant to scandalize him said, He made a false Oath, (Innuendo the said Oath before the Judge) where it was held, That the Innuendo was sufficient to ascertain what Oath was meant.

But the Court reversed the Judgment in this Case, and said, That not saying in the Declaration that the Words were spoken of the Plaintiff, it was not sufficient to bring that in by an Innuendo, which ought to have been averred; and it is the worse, because 'tis said quidam J. S. which imports another Person than the Plaintiff.

Anonymus.

**E**rror to reverse a Judgment given in the King's Bench in Ireland, in a Prohibition, where the Issue was, Whether he prosecuted in the Court Christian after the Prohibition? and it was found for the Plaintiff, and Damages assessed to 100 l. and 6 d. pro misis & custagiis. Postea 348, 350, 362.

And now the Error was assigned in the Judgment given, which Raym. 387. was, That the Plaintiff should recover damna prædicta per Juratores assess. ad 100 l. nec non pro misis & custagiis de incremento per Cur' adjudicat' 20 l. omitting the 6 d. Costs given by the Jury.

On the other side it was said, That damna prædicta in the Judgment included all, and the saying 100 l. was but a Miscomputa-  
tion. Et adjournatur. Postea Hill. 33. & 34. Car. 2. 362.

How



How *versus* Whitfield.

Chief Justice  
Jones 110.  
Postea 339.

**A** Fine of certain Lands to the use of J. S. for Life, and after to his Executors and Assigns for 80 years, with Power to the Lessee and his Assigns to let Leases for 21 years, reserving the ancient Rent.

After several mean Assignments, the Assignee of an Executor of an Assignee made a Lease for 21 years, which in the Special Verdict was found to be made of the said Lands inter alia, reserving proinde six shillings per Annum, and found that six shillings was the ancient yearly Rent for the Land.

The Court seemed to be of Opinion, That an Assignee after so many Removes might execute this Power, for it was coupled with an Interest, and annexed to the Estate, tho' to be construed strictly; but in regard the Lease was made of the Land inter alia, reserving proinde, &c. in case the Reservation should be taken to be for the whole Land, then it was not the ancient Rent reserved for this; and upon that they doubted. Et adjournatur. Postea 339.

Anonymus.

**A** Judgment was quashed for want of Addition; For the Court said, No Process ought to go out thereupon, because the Party cannot be outlawed.

Anonymus.

**I**n an Habeas Corpus the Return was, That the Party was taken upon an Excom' Cap'.

It was moved, That the Party might be discharged, because upon Search it appeared that the Writ had not been enrolled in this Court; for so it ought to be by the Statute of the 5th of the Queen, tho' the Writ issues out of Chancery.

Ante 309.

The Court doubted, Whether they could discharge him upon a Motion, or that he should be driven to plead this Matter? And it was said the Course had been both ways. Vid. Parker's Case 3 Cro. 553.

But the Party was afterwards discharged; ut opinor.

Herne *versus* Brown.

**A** Prohibition was prayed to a Suit in the Ecclesiastical Court. T Jones 122.  
2 Lev. 247.

The Libel sets out, That a Tax had been made for the Repairs of a Church where the Defendant inhabited, and was to make him pay his Proportion. To which they required his Answer. (viz.) Whether he had paid, &c.

The Suggestion was, That the Party had tendered his Answer, but the Court had refused it, because it was not upon Oath, and that the Ecclesiastical Court cannot tender an Oath to the Party sued, nisi in causis Matrimonialibus & Testamentariis.

But the Court, after hearing divers Arguments, denied the Prohibition; for they said, It was no more than the Chancery did, to make Defendants answer upon Oath in such like Cases.

Termino Sanctæ Trinitatis, Anno 31 Car. II.

In Banco Regis.

How *versus* Whitfield, ante in ult. Term.

**I**n Replevin, the Plaintiff declares of the taking of his Cattle in a Close, containing five Acres. Ante 338.  
T. Jones 110.

The Defendant avows, and sets forth a Fine to the use of A. in Tail, which descended to him, Virtute cujus he was seised in Dominico ut de feodo talliato, &c.

The Plaintiff replies, That the Fine was first to the use of J. S. for Life, the Remainder to his Executors, Administrators and Assigns for 80 Years, with Power to him and his Assigns, to let the five Acres in Possession or Reversion for 21 Years, determinable upon three Lives, reserving the ancient Rent, and that J. S. devised this Term to J. N. and died; his Executors assented, and after it came to the Executors of J. N. who assigned it, and that the Assignee made a Lease of the said five Acres inter alia, reserving proinde the Rent of 6 s. per annum, and avers that the ancient Rent was 6 s. per annum.



The Avowant rejoins, setting forth his former Title. And the Plaintiff demurs.

It was objected;

First, That the Plaintiff ought to have traversed the Seisin in Tail, alledged by the Avowant, seeing in his Replication he sets forth and intitles himself under an Estate inconsistent with it.

To this it was answered, and the Court agreed, That there ought to be no traverse; for the Avowant doth not say, it was his Freehold, or that he was seised in Tail; but only under a Virtute ejus, &c. And the Plaintiff in his Replication sets forth a Title consistent with all that the Avowant alledges, and so confesses and avoids, and all depends upon the execution of the Power. And for that,

Secondly, It was objected, That he which made this Lease was not Assignee of J. S. for Executors were not within the Power, and consequently not their Assignees: This is a Power collateral to the Estate, and shall not run with the Land; for then Assignees of Commissioners of Bankruptcy, the Assignee of the Term of the Sheriff upon an Execution, &c. should execute this Power. It is like Covenants annexed to Leases, which the Assignee could not take advantage of till 32 H. 8.

Again, Here appears to be no good Reservation, for the Lease is of the five Acres inter al', reserving proinde, so that the Rent issues out of other Lands as well as the five Acres, and therefore cannot be said to be the ancient Rent reserved upon that.

The Court were all of Opinion, That the Assignee in this case might execute the Power, and conceived that Assignees might include Assignees in Law, as well as Fact; but however the Tenant for Life devising this Term, the Deviser was an Assignee, and the Power in the greatest strictness of Acceptation was in him, and consequently must go to his Executors, and by the same Reason to their Assignee.

As to the reserving the Rent proinde, the Court said it might be intended that the inter al' might comprehend nothing but such things out of which a Rent could not be reserved, and then the six Shillings was reserved only for the five Acres. However the proinde might reasonably be referred only to the five Acres, and not to the inter al', and that a distinct Reservation of six Shillings might be for five Acres. And so Judgment was given for the Plaintiff. Ante 338.

Vid. Mo.  
855.

*Scead versus Berrier.*

**E**RROꝝ upon a Judgment given in the Court of Common Pleas, upon a Special Verdict the Case was to this effect; J. S. made his Will in Writing, and devised Lands to his Son J. S. and his Heirs, and in the same Will gave a Legacy of 100 l. to his Grandson. The Son died afterwards, in his Life-time, after whose decease J. S. the Grandfather, made a Codicil, wherein he gave away part of the Lands devised, as aforesaid, to a Stranger, and afterwards declared by Parol, That his Intention was, that his Grandson J. S. should have the Lands, which his Son J. S. should have had.

Pollexf. 346.  
Ch. J. Jones,  
135.  
Raym. 408,  
409.  
1 Mod. 267.  
2 Mod. 313.  
3 Keb. 845,  
2 Lev. 135.

The Question upon this Special Verdict was, Whether this were sufficient to carry the Lands to the Grandson? And Judgment was given in the Common Pleas by three Judges against one, that it was. Whereupon a Writ of Error was brought in this Court.

2 Mod. 313.  
314.

Finch, Solicitor, argued, That this Will was sufficient to carry it to the Grandson. He agreed Brett and Rigden's Case in Pl. Com. that a Devise to a Man and his Heirs, who dies in the Life of the Devisor, a new Publication will not be enough to make the Heir take by the Will, because named in the Will by way of Limitation of the Estate, and not Designation of the Person that should take. But in Fuller's Case in the 1 Cro. 423. and in Mo. 2. where the Devise was to his Son Richard and the Heirs of his Body; which Richard afterwards died in his Life-time, and then the Devisor said, My Will is, That the Sons of Richard, my Son deceased, shall have the Land devised to their Father, as they should have had if their Father had lived and died after me. There Popham and Fenner held, That this new Publication would carry the Land to Richard's Son. Gawdy and Clench contra. But our Case is much stronger; for there, Heirs of the Body were used only for Limitation; but in the Will here, where the Words are, I Devise to my Son J. with this new Publication the Grandson J. may take, because a Grandson is a Son; and when a Will is new published, it is all one as if it were wrote at the time of such Publication. Beckford and Parncor's Case in the 1 Cro. 493. Mo. 404. Devise of all his Lands, and after the Will the Devisor purchaseth other Lands, and then publishes it again, it will carry the new purchased Lands. Dyer 149. Trevelian's Case. Cestuy que use before the 17th of H. 8. devised the Lands; a new Publication will pass the Lands executed in him, by the Statute.



The Opinion of the Court inclined to reverse the Judgment ; They held it to be the same with Fuller's Case in the 1 Cro. that no Parol Averment can carry Lands to one Person, when the Words of the Will plainly intended them to another. They agreed, If a Man having no Son, but a Grandson, deviseth his Lands to his Son, the Grandson may take : But here is an opposition contained in the new Publication, (viz.) Those Lands which my Son J. should have had, my meaning is, my Grandson J. shall have. And in the Will it self there is a Legacy devised to the Grandson by that Name ; so where they are so distinguished, 'tis impossible to take the Grandson to be meant by the name of Son. As to Beckford's Case, the Words are full to carry all, and therefore it had been impertinent to have wrote over the Will again. So where a Man has two Sons named John, it may be well averred that he meant the younger Son ; for nothing in the Will is inconsistent with such meaning.

1 Sid. 149.

The Court took time to deliver their Opinions. And afterwards the Chief Justice delivered the Opinion of the Court, That neither the Republication, nor Parol Declaration, could operate as a Devise to R. &c. the Grandson.

Pepis's Case.

**A** Mandamus to restore him to his Place of Recorder of the Town of Cambridge.

The Return was, That they were incorporated by the Name of Mayor, Aldermen, &c. with a Power to chuse a Recorder, Habendum pro termino vite, aut ad voluntat' eligentium.

That M<sup>r</sup>. Pepis was chosen Recorder ad voluntat' eligentium : And that afterwards by the Votes of the greater number of the Electors he was removed, and the Lord Allington constituted Recorder under their Common Seal, &c.

Ante 77, 82.

Upon this Return it was moved for M<sup>r</sup>. Pepis, That altho' they had alledged a Power to chuse a Recorder at Will, yet they should have shewn Cause for his Removal, being a judicial Office, which the Court takes notice of ; and that none had such a Power but the King to remove Judges ad libitum.

Again, A Corporation aggregate cannot determine their Will, but under their Common Seal, and that is not shewn here.

2 Sid. 49, 72.

Curia. Where a Recorder is at Will, they may remove him at pleasure, as it is in Blagrove's Case, and several other Cases.

As to the other Point, it does not appear that he was constituted under their Common Seal, perhaps then they must have determined their Will under their Common Seal; but now 'tis well enough, my Lord Allington is constituted under their Common Seal, which Ad removes the other, so it was adjudged against Mr. Pepis.

Termino Sancti Michaelis, Anno 31 Car. II.

In Banco Regis.

**A** Prohibition was prayed to the Court of Admiralty upon a Suggestion, That the Suit was there upon a Contract made upon the Land. The Case was thus;

A Bargain was made upon the Land with several Seamen, to bring up a Ship from a Port in England to London, for a certain Sum to them to be paid. And for the Prohibition 'twas alledged, That this being upon the Land, and a Contract with divers jointly for a Sum in Gross, it could not be within the ordinary Rules of Mariners Wages, which is permitted to be sued for in the Court of Admiralty in favour of the Mariners, because they may all join in that Court, and not be put to the inconvenience of suing severally, as they must at Law; but as this Contract is, they are to sue jointly at Common Law.

But the Prohibition was denied, for this must be taken as Mariners Wages: And therefore tho' the Contract were upon the Land; yet they have Jurisdiction: Besides the Party comes after Sentence, and therefore in the Court's discretion, whether they will then grant a Prohibition.

Note, A Rump-Ad was made to enable Mariners to sue for Wages in the Admiralty, but yet the Law was taken to be so before. Vid. 3 Cro.

Anonymus.

**A** Prohibition was prayed to the Ecclesiastical Court, where the Libel was for these Words, You are a Whore, and ply in Moorfields. And the Suggestion was, That the Words were spoken in London, where an Action lies for such Words; and for that Cause a Prohibition was granted, otherwise Suits might have been in the Court Christian for such Words, tho' not singly for the word Whore, being a common Word of babbling, otherwise where joined with Words, which shew the intent to defame in that kind.

Anonymus.

Ante 146.  
Ante 7, 61,  
72, 220.  
1 Mod. 21.  
Postea 352.



Anonymus.

**A** *Indebitar.* Assumpsit was brought for Goods sold and delivered. The Action was laid in London, and a Motion was made to change the Venue, upon an Affidavit, That the Sale was in Kent. But on the other side it was said, The delivery was in London, and that where the Matter consists of two parts in several Counties, the Plaintiff shall have his Election; to which the Court agreed.

Anonymus.

Gage and  
Acton, Hill.  
11 W. in B. R.  
contra.  
Vid. 1 Mod.  
R. 211.

**A** Man covenants with his intended Wife, to give her leave to dispose of so much by her Will, and then they intermarry, the Husband having given Bond to a third person for the performance of these Covenants, after the Death of the Wife the Husband is sued upon the Bond, for not permitting her Will to be performed: And upon Oyer of the Condition it was insisted on for the Defendant, that these Covenants were discharged by the Marriage, and so the Bond likewise loseth its force. Vid. Hob. 216. Et adjournatur.

Anonymus.

**A** Motion was made to quash an Inquisition of forcible Entry; it was *Inquisitio capta per Juratores super Sacramentum subornatorum T. S. & J. N. Justiciariis, &c. qui dicunt super Sacramentum predictum.*

And it was objected, That qui dicunt, &c. referring to the last Antecedent, it was that the Justices say: Sed non allocatur, for super Sacramentum predictum makes it certain.

Note, The Caption of an Indiamment may be amended the same Term it comes into Court.

Anonymus.

**A** *Indiamment* for not taking upon him and executing the Office of a Constable, to which he was chosen by the Leet. The Question was, Whether a Tenant in ancient Demesne were obliged to that Office? And the Court held, that he was.

Termino Sancti Hillarii, Anno 31 & 32 Car. II.

In Banco Regis.

Harrison and Belsay.

**I**N Ejecution upon a Special Verdict the case was thus ;  
A Lease was made to A. and B. for their Lives, Remainder to  
the first Son of A. &c. Remainder to the Heirs of A. B. con-  
veys his part to A.

Raym. 413.  
Ch. J. Jones's  
136.

The Question was, Whether the Contingent Remainder to the  
first Son were destroyed ?

Holt argued that it was. For a Contingent Remainder must  
have some particular Estate of Freehold to support it, and by the  
Release of B. his Estate was gone ; and there became an entire Fee  
in A. For by whatsoever means a Joint-tenant for Life conveys his  
Moiety to his Companion, it does not enure by Grant of the Estate,  
but by Release, as Eustace and Scawen's Case, 2 Cro. 696. A. and  
B. Joint-tenants for Life, A. levies a Fine to B. B. dies, there shall  
be no Occupancy of the Moiety of A. during the Life of A. Jones 55.  
and the Case of Lewis Bowels, 11 Co. is not to be objected, where  
an Estate for Life was made to B. and F. the Remainder to their first  
Son, that they should have, in Tail, Remainder to B. and F. in Tail ;  
here, tho' an Estate in Tail is executed in B. and F. until a Son  
born, yet after, upon the Birth of the Son, the Contingent Re-  
mainder shall vest, and split and divide the former Estate ; but here  
the Fee becomes executed by several Conveyances, but there the  
Estate Tail was executed by the first Conveyance. And in the Case  
at Bar until the Release of B. the Fee was not executed in B. for the  
preservation of the Jointure, and so the Right and Condition of the  
Estate altered by matter subsequent, and by consequence the Con-  
tingent Remainder destroyed. 2 Co. 60, 61.

The Court doubted, Whether there were such alteration of the  
Estate, as to destroy the Remainder ? For they said, To some pur-  
poses the Fee was executed before the Release, for if the Joint-te-  
nants had joined in a Lease for Years, on Action of Waste would  
lie against the Lessee. Et adjournatur. Afterwards it was adjudg-  
ed that the Remainder was destroyed. Ante 306,  
307.  
2 Saund. 386,  
387, 389,  
Vid. 1 Inst.  
184. a.

Anonymus.



Anonymus.

A Person who was committed to the Tower for Conspiring the Death of the King, was brought up by Habeas Corpus, and prayed to have Bail taken, unless an Indictment were found against her this Term, according to the new Act of 31 Car. 2. for Habeas Corpus's.

The Court said, That they which would have the benefit of that Act, must pray it before the first Week of the Term expires; but in regard it appeared, that she had prayed it before by her Counsel, and her Habeas Corpus was taken out in time, the Court said, The benefit of the Act should be saved to her, for the prayer is not necessary to be made in Person, But Mr. C. G. was refused the advantage, he having omitted to make the Prayer during the first Week, either in Person or by Counsel.

Sir Robert Peyton's Case.

He was brought up by Habeas Corpus from the Tower, his Counsel pressed much to have the Return filed, supposing that he would be then a Prisoner to the Court, and committed to the Marshalsey; but the Court ordered the Return to be filed, and notwithstanding remanded him to the Tower, as they said they might do.

The King *versus* Plume.

Ante 326.  
2 Lev. 206.  
3 Keb. 816,  
843.

Atre Hill. 29 & 30 Car. 2. The Case was spoken to again upon the Demurrer to the Indictment, for using of the Trade of a Fruiterer, contra 5 Eliz. not having been bound an Apprentice.

Scroggs, Chief Justice, and Dolben inclined to the Opinion, That it was a Mystery within the Statute, there being great Art in chusing the times to gather, and preserve their Fruit; and that the Cause deserved the more Consideration; for that the Fruiterers were an ancient Corporation in London, (viz.) From the time of E. 4. Also a Barber, Upholster, and lately a Coachmaker, ruled to be within the Act.

Jones and Pemberton seemed to be of another Opinion, for it would be very inconvenient to make every one that sells Fruit by the penny within the Act, and majus & minus would make no odds; Surely since the 5th of Eliz. there would have been some Prosecution by the Company of Fruiterers in this Case, if it would have lain. Brewers and Bakers require Skill, and yet not within the Act. But the Court took time to deliver their positive Opinions, Et adjournatur. Ante 326.

Reve *versus* Cropley.

**A**N *Indebitat' Assumpsit* was brought for 20 l. as Executor to William Burroughs, for so much of the said William's Money had and received by the Defendant in his Life-time; whereupon the Plaintiff had Judgment by *Nihil dicit*, and upon a Writ of Enquiry, (the Plaintiff not being provided to prove the Debt, supposing it to be confessed by the Judgment,) the Jury found but two pence Damages.

Ventris moved to set aside the Writ of Enquiry, for that the Plaintiff was not obliged in this Action to prove the Debt at the executing of the Writ of Enquiry, no more than if he had brought an Action of Debt. 2 Cro. 220. In *Trespas* for taking of Goods, the Property is not to be proved upon the Writ of Enquiry after Judgment for *nihil dicit*; for, said the Court, if he should fail thereof, it would be in destruction of the first Judgment. Vid. *Yelv.*

152.

*Curia*. This being in an Action upon the Case which lies in Damages, the Debt ought to have been proved, and so let it stand.

Note, If a *Verdict* be for 30 l. and the Judgment is *quod recuperet damna prædicta ad 32 l.* this surplus will do no hurt, because *its damna prædicta*. Jones 171.

Cooke *versus* Fountain.

**I**N an Ejectment upon a Trial at the Bar, the Title of the Lessor of the Plaintiff was upon the Grant of a Rent, with Power to enter for Non-payment.

The Executor of the Grantor was produced as a Witness for the Defendant. And it was objected against him, that in the Grant of the Rent, the Grantor covenanted for himself and his Heirs to pay it, and that the Executor being obliged, was no competent Witness.

Against which it was much insisted upon on the other side, That this Covenant annexed to a real Estate would not bind the Executor, but only the Heir.

But the whole Court were against it. The Counsel for the Defendant mentioned a Bill of Exceptions, and the Court doubted, whether it would lie in the King's Bench, so they waved it, and shewed that the Executor had fully administered the Inventory: But they gave a further charge on the Plaintiff's side, and so that Witness was set aside.



Termo Sanctæ Trinitatis, Anno 32 Car. II.  
In Banco Regis.

Anonymus.

**I**n an Action upon the Case, the Plaintiff declared, That he kept a Stage-Coach, and got his Livelihood by carrying of Passengers: And that the Defendant spoke such scandalous Words of his Wife, that reflected upon him, and rendered him so ridiculous, that no Body would ride in his Coach, and he thereby lost his Customers.

After a Verdict for the Plaintiff, it was moved to stay Judgment, That here was no cause of Action: But on the other side, a Case was cited of one Bodcingle, 14 Car. 2. C. B. where the Plaintiff declared, That he was an Innkeeper, and that the Defendant had presented his Wife at a Leet for a Scold, and that such and such Guests in particular had absented from his House upon it, and after Verdict he had Judgment.

But the Court here said, That the Cases differed, for that quality of the Wife's might make the House troublesome to the Guests; but a Stage-Coachman could receive no probable prejudice in his Trade by defaming of his Wife, or at the least the Plaintiff should have declared, what Customers he had lost in particular, and therefore they ordered quod querens nil capiat per Billam.

Anger versus Brewer.

Postea 350.  
Ch. Justice  
Jones R.  
128.  
Ante 337.  
Postea 362.

**I**n an Attachment upon a Prohibition, the Plaintiff declared, That he proceeded in the Court Christian, after the Prohibition delivered.

After Judgment by nihil dicit and 100 l. Damages given to the Plaintiff, it was moved to stay Judgment; That there was no place laid in the Declaration, where the Defendant prosecuted since the Prohibition delivered, and so if Issue had been taken upon non prosecut. sult post deliberat. brevis, whence should the Venue have come: But it being made appear to the Court, That in all the Precedents of these kinds of Declarations, there is no place found mentioned of the Proceeding after Delivery of the Writ, but the Place only expressed where the Writ was delivered, they thereupon over-ruled this Specious Exception. Post. 350,

Anonymus,

Anonymus.

**O**ne A. B. was indicted of High Treason in Conspiring the Death of the King, and was brought to his Trial at the Bar this Term, and one D. being produced a Witness against him; the said A. B. excepted against him, for that the said D. had been Outlawed of Felony and burned in the Hand, and produced the Record.

The Witness, to clear himself thereof, produced the King's Pardon, whereby he was pardoned of the said Crimes, Outlawry, &c.

The Prisoner still objected, That the Pardon did not restore him to his Credit; and that notwithstanding he was no legal and competent Witness, and prayed that he might have Counsel assigned him, to argue the Point, which was granted: And the Court having heard his Counsel, and conceived some doubt in the Matter, they desired Mr. Justice Raymond to consult with the Judges of the Common Pleas, to which Court Raymond immediately went, and at his return reported to this Court the Opinion of the said Judges to be, that he might be sworn. But if a Man convicted of Perjury were afterwards pardoned; yet that would not enable him to be a Witness, because it seemed to be an injury to the People, to make them subject to the Testimony of such an one. Vid. Hob. 81. Pardon takes away poenam & reatum; so D. was sworn. 1 Sid. 52.

Colepepper's Case.

**H**e was indicted of High Treason, for raising Rebellion in Carolina, (one of the King's Foreign Plantations in America) whereupon he was this Term tried at the Bar and acquitted.

Note, By 35 H. 8. cap. 2. Foreign Treasons may be either tried by Special Commission, or in the King's Bench by a Jury of the County, where that Court sits. Vid. Co. 1 Inst. 261. b.

Anonymus.

**U**pon a Trial at Nisi prius at Guildhall before my Lord Chief Justice North, in Trover and Conversion against an Executor de son tort,

The Question came to be, Whether the Goods having been taken in Execution, upon a Judgment obtained against the Defendant by a Creditor of the Deceased, should discharge him against the Plaintiff who brought this Action as Administrator? And the Opinion of the Chief Justice was, That this Exception was a good Discharge against another Creditor that would sue him, to whom he might plead Riens inter ses mains, but it was no Discharge against an Kell. 59.  
1 Sid. 76.  
But he shall  
be Recoupt  
in Damages,  
pro tanto.

¶ r 2

Admini-



Kellw. 59. Administrator, for Men must not be encouraged to meddle with a personal Estate without Right; but to prevent this mischief where the Party dies Intestate, and there is contest about the Administration, a Man may procure of the Ordinary Letters ad colligendum.

Termino Sancti Michaelis, Anno 32 Car. II.

In Banco Regis.

Anonymus.

**T**he Statute of 43 Eliz. cap. 2. that enables Justices of Peace, where a Parish is unable to provide for their Poor, to tax the neighbouring Parish, the Lords being, Any other of any other Parish, it was resolved, That the Justices might impose the charge upon any of the Inhabitants of the neighbouring Parish, and were not obliged to put a general Tax upon the whole Parish.

Anger *versus* Brower.

Ante 348.

**A** Prohibition, the Plaintiff declared upon an Attachment, That at such a day and place he delivered the Writ to the Defendant, and that he had prosecuted the Suit in the Court Christian since, and upon Judgment by Nihil dicit, and upon a Writ of Enquiry, 100 l. Damages were found, and Judgment given, and a Writ of Error brought.

The Error assigned was, That the Plaintiff had laid no Venue where the suing was since the Writ delivered, which was the cause of Damage, and not the delivery of the Writ, so that place would not serve. On the other side it was said, That the Precedents were generally this way: But to that the Court said, That where those Precedents were, there was no further Proceeding after Judgment, as there seldom was when there was Judgment by Nihil dicit; but here they reversed it for this Error. Ante 348.

The Case of the City of London, concerning the Duty of Water-Bailage.

**T**HE Mayor and Commonalty of London brought an Indebitatus Assumpsit against A. B. for 5 L. for so much due to them for divers Tons of Wine, brought from beyond the Seas to the Port of London, at four pence per Ton.

Upon Non Assumpsit pleaded, and Trial at the Bar, divers Freemen of London were offered as Witnesses for the Plaintiff. But the Counsel of the other side excepted to them, for that they were Parties, the Commonalty of London comprehending all the Freemen, and likewise interested.

On the other side it was said, That their Interest was in no sort to be considered, it being so very small and remote; a small Legatee hath been sworn to prove a Will. In an Indictment against the County for not repairing of a Bridge, one of the County may be a Witness (and this Justice Dolben said, he had known in the Case of Peterburgh-Bridge.) In a Robbery for Statute de Winton, the Plaintiff shall be sworn a Witness, and that for Necessity.

But it was replied, That there was no Necessity, for they might have other Witnesses besides Freemen, (tho' perhaps with difficulty.) In an Action against the Hundred upon the Statute of Winton, an Hundredor cannot be a Witness.

Scroggs, Chief Justice, Dolben and Raymond were of Opinion that they were Witnesses.

Jones contra. And a Bill of Exceptions was tendered by the Counsel for the Defendant, which the Court proffered to seal, and to allow three or four Days time to draw it up.

But afterwards the Plaintiffs Counsel offered other Witnesses, and set by their Citizens; but the Verdict went for the Defendant.

Note, It was said, That the Lord Mayor could not release the Action but under the Common Seal; and that for a Duty or Charge upon a Corporation, every particular Member thereof is not liable, but Process ought to go in their Publick Capacity.

Note, A Sheriff was ordered to attend the Court for demand<sup>2 Sid. 155,</sup> ing an excessive Fee for the execution of an Hab' fac' possess. the<sup>156.</sup> Court saying there was none due.



Anonymus.

Ante 343.

**A** Prohibition was granted to the Consistory Court of the Bishop of London, for citing one for calling of her Whore; because such Words by the Custom of London are punishable in the Courts of Law there.

Anonymus.

Cr. Car. 102.  
Kellw. 61. b.

**I**f the Plaintiff dies after the Term begin, tho' before Judgment entered; yet Judgment may be entered, because every Judgment relates to the first Day of the Term.

Anonymus.

2 Lev. 140,  
152.  
Dev. 278.  
3 Keb. 489,  
564, 566,  
604.  
Ante 182.

**A** Motion was made to quash an Inquisition taken before the Coroners super visum corporis of one that killed himself, which found that he was Felo de se.

But the Court were informed, That the Party was Non compos mentis, and that there had been an undue Practice by the Coroner; of both which great Proof was made, and upon that it was quashed.

Note, The Court said, That if the Body could not be digged up, there might be an Indictment exhibited to the Grand Jury, who might enquire thereupon.

Termino

Termino Sancti Hillarii, Anno 32 & 33 Car. II.

In Banco Regis.

Anonymus.

**A** Motion was made against a Judge of an Inferiour Court of Record, for increasing upon a View the Damages in an Action of Trespass and Battery to so much more than was given by the Jury.

Curia. The proper way is to reform it by a Writ of Error; for none but the Courts at Westminster can increase Damages upon a View.

Anonymus.

**I**f a Writ of Error in Ejectment, &c. abates by the Act of God, a second Writ will be a Superfedeas. Otherwise where it abates by the Act of the Party.

Anonymus.

**I**n a Writ of Error to reverse a Fine, the Proclamations were pleaded in the same Fine, and five Years quiet Possession, and this in the bar of a Writ of Error.

The Court inclined, That the Error being in the Fine, five Years Possession could not be pleaded. Sed adjournatur. Mo. Rep. 8.

Termino



Termino Paschæ, Anno 33 Car. II.

In Banco Regis.

**N**Ote, This Term Sir Francis Pemberton was made Lord Chief Justice of the King's Bench in the room of Sir William Scroggs, who was displaced.

Page *versus* Denton.

**H**ILL. 32 & 33 Car. 2. Rot. 45. In Debt upon a Bond against an Executor, who pleads that the Testator was indebted to him by an Obligation, the Condition whereof was to pay Rent; and that at the time of his Decease there was 300 l. due for Rent, and that he had not more than 60 l. Assets to pay it, &c.

The Plaintiff replied, That there was but 30 l. due for Rent at the time of the Testator's Death.

Which the Court held to be a good Replication, altho' the Penalty of the Bond was forfeited at the time of the Testator's Death. For if a Bond due to a Stranger be forfeited, and this be pleaded by an Executor, and that he hath not Assets ultra, 'tis a good Replication to say, That the Obligee would have taken part of his Money in full, and it shall be a Bar for no more; and here the Defendant ought to take but his due Debt.

And the Court said, That if Men would plead their Case specially, it would save many a Suit in Chancery.

Fitzharris's Case.

**E**Dward Fitzharris was indicted of High Treason; upon which being arraigned, and demanded to plead, he delivered in a Paper containing a Plea to the Jurisdiction of the Court; which could not be received, (as the Court said) not being under Counsel's hand. Whereupon he prayed to have Counsel assigned, and named divers, whereof the Court assigned four. And he was taken from the Bar, three or four Days being given him to advise with his Counsel, to prepare his Plea as they would stand by him.

The Counsel prayed, that they might have a Copy of the Indictment.

But the Court denied it and said, That it was not permitted in Treason, or any other Capital Crimes.

But Justice Dolben said, That sometimes it had been allowed to take Notes out of the Indictment. Vid. Mirror 304. Abusion est que Justices ne monstre l'Indictment a les Indictes s'ils demandront. Sect. 115.

Termino Sanctæ Trinitatis, Anno 33 Car. II.  
In Banco Regis.

Anonymus.

**I**N an Action of Debt against the Executor, in the Debet and Detinet, upon a surmise of a Devastavit, the Defendant was held to Special Bail, and so ruled upon Motion. Ante 321. contra.

Haddock's Case.

**I**T was said by the Court, That if a Corporation that hath been by Prescription, accept a new Charter, wherein some alteration is of their Name, and likewise of the Method in the Governing part; yet their Power to remove, and other Franchises which they had de temps d'ont, &c. do continue; and if the Power to remove be at their Will and Pleasure, this Will must be expressed under their Common Seal; but in a Return to a Mandamus, debito modo amicus may suffice. Raym. 435.

Note, No Writ of Error lies upon an Indictment of Recusancy and Conviction by Proclamation. Raym. 434.

Note, In an Exdamment, where there are divers Defendants which are to confess Lease, Entry and Duster; if every one do not appear at the Trial, the Plaintiff cannot proceed against the rest, but must be nonsuit. 2 Vent. 195. contra.

Y y

Termino



Termino Sancti Michaelis, Anno 33 Car. II.

In Banco Regis.

Anonymus.

**I**N Covenant, the Plaintiff declared upon several Breaches, one whereof was, for not paying of 7 l. according to the Covenant.

It was moved for the Defendant, That he might be admitted to bring 7 l. into Court to pay to the Plaintiff, together with his Costs hitherto, &c. as is usual in Cases of Debt or Assumpsit for Money, and that the Plaintiff might proceed for the rest, if he thought fit: But the Motion was denied, because the Plaintiff had declared of other Breaches, and the matter lay in Damages.

Bound and Brooking.

T. Jones 148.

**E**rror upon a Judgment in the Common Pleas, where the Plaintiff declared in an Action upon the Case, That he had Common in the Defendant's Lands, & habere debuit, &c.

The Defendant demurred, because not set out how the Plaintiff was intitled to the Common, whether by Prescription, or otherwise. Notwithstanding which, Judgment in the Common Bench was for the Plaintiff, and now the same matter insisted on for Error here, and the Court doubted.

Ante 319.

To make the Declaration good, there was quoted the Case of Sands and Trefusis, in the 3 Cro. in an Action for stopping of a Water-course to his Mill, which was held good without saying an ancient Mill, or that he was intitled to the Water-course by Prescription, or otherwise. 2 Cro. 43. 122 Dent and Oliver: An Action for disturbing of him to take Toll, and no Title set forth. Sed adjournatur. Vid. Co. Entr. 9. 11.

Day versus Copleston.

**I**N an Assumpsit for Money, the Defendant pleaded the Statute for the Discharge of poor Prisoners, and that he had been discharged by that Act; which provides, That there shall be no After-Prosecution by a Creditor in such case, so as to subject the Body to Execution, and says, That he can say nothing further in bar of the Action.

Upon which the Plaintiff demurred, and the Defendant joined in the Demurrer, and Judgment was entred up for the Plaintiff, but with a Cesset executio quoad Corpus, &c.

And the Court approved of this way of pleading the Statute, for otherwise they said, If the matter had not been disclosed in pleading, they doubted whether they could have given the Defendant the benefit of the Act, but he would be driven to his Audita Querela.

Anonymus.

**E**RROZ of a Judgment in the King's Bench in Ireland, it was suggested, that the Plaintiff was in Execution upon the Judgment in Ireland.

And the Court seemed to be of Opinion, That a Habeas Corpus might be sent thither to remove him, as Writs Mandatory had been awarded to Calais, and now to Jersey, Guernsey, &c.

Anonymus.

**T**he Case was, A. Tenant in Tail, Remainder to B. in Tail, &c. A. makes a Lease for the Life of the Lessee, not warranted by the Statute, and dies, leaving B. in Remainder his Heir: B. lets for 99 Years, to commence after the Death of the Tenant for Life, reserving Rent; and then the Tenant for Life surrenders to B. upon Condition, and dies; B. suffers a Recovery with single Voucher, and dies; the Lessee for Years enters, the Heir of B. distrains for the Rent, and the Lessee brings a Replevin; and upon an Abowry, and pleadings thereupon, this Case was disclosed to the Court of Common Bench, and Judgment given there for the Abowant, and Error thereupon brought in th's Court.

For the Plaintiff in the Error it was argued, That the Lease being derived out of a Reversion in Fee, which was created in A. upon the Discontinuance for Life, and the new Fee vanishing by the surrender of the Tenant for Life, (for it was urged, he was in his Remitter, although the taking of the Surrender was his own Act) that the Lease for Years by consequence was become void.

Again, It was objected against the Common Recovery, That the Tenant in Tail, and a Stranger which had nothing in the Estate, were made Tenants to the Præcipe, and therefore no good Recovery.

Again, In case B. were not remitted after acceptance of the Surrender, then he was seised by force of the Tail, and so no good Recovery, being with single Voucher.



On the other side it was argued to be no Remitter, because the Acceptance of the Surrender was his own Act, and the Entry was taken away. But admitting it were a Remitter, because by the Surrender the Estate for Life (which was the Discontinuance) was gone, and it was no more than a Discontinuance for Life: For if Tenant in Tail lets for Life, and after grants the Reversion in Fee; if the Lessee for Life dies after the Death of the Tenant in Tail, so that the Estate was not executed in the Grantee during the Life of the Tenant in Tail, the Heir shall immediately enter upon the Grantee of the Reversion. Co. Lic. It seems also to be stronger against the Remitter in this Case, because it is not absolute, but only conditional; however the Lease may be good by Estoppel, for it appears to have been by Indenture, and if the Lessor cannot avoid the Lease, the Lessee shall without question be subject to the Rent.

But it was objected against the Estoppel, That here an Interest passes, and the Lease was good for a time: As if the Lessee for ten Years makes a Lease for twenty Years, and afterwards purchaseth the Reversion, it shall bind him for no more than ten.

To which Pemberton, Chief Justice, said, The difference is, where the Party that makes the Estate, has a legal Estate, and where a defeasible Estate only; for in the latter a Lease may work by Estoppel, though an Interest passed, so long as the Estate (out of which the Lease was derived) remained undefeated.

As to the Recovery, it was held clearly good, altho' a Stranger, that had nothing in the Land, was made Tenant to the Præcipe with the Tenant in Tail; for the Recompence in Value shall go to him that lost the Estate, and being a common Assurance, 'tis to be favourably expounded. Et adjournatur.

Termino

Termino Sancti Hillarii, Anno 33 & 34 Car. II.

In Banco Regis.

Moor and Pitt,

**I**N Error upon a Judgment, in Ejectione Firmæ in the Common Pleas, where the Case was, That the Bishop of London was seized in jure Episcopatus of a Manor, of which the Lands in question were held, and time out of mind were demised and demisable by Copy of Court-Roll for Life, in Possession and Reversion; and J. S. being Copyholder for Life in Reversion, (after an Estate for Life in Ann Pitt) and J. N. being seized of the Manor by Disseisin, J. S. at a Court holden for the Manor in the Name of J. N. surrendered into the Hands of the said J. N. (the Disseisor-Lord) to the use of the said Lord. Afterwards the Bishop of London entered, and avoided the Disseisin. Ann Pitt died, and an Ejectment was brought by J. S. and it was adjudged in the Common Bench that he had a good Title; and now upon a Writ of Error in this Court, the matter in Law was insisted upon by Pollexfen for the Plaintiff in the Writ of Error.

Vid. Pitt and Moore.  
Ch. Just.  
Jones, 153.  
2 Mod. 287.

That this Surrender to the Disseisor-Lord, to the Lord's own use, was good; for all the Books agree, a Copyholder may surrender to a Disseisor of the Manor, to the use of a Stranger, and why not to the Lord's own use? As if Lessee for Years be ousted, and he in Reversion disseised, and the Lessee releases to the Disseisor, this extinguishes his Term. Here is a compleat Disseisin of the Manor by Attornment of the Freeholders, (without which the Services cannot be gained) and the Copyholders coming to the Disseisor's Court, and by making surrenders, &c. owning him for their Lord, tantamounts.

Serjeant Maynard contra. And he insisted, That this surrender was not good, for the Disseisor had no Estate in this Land capable of a surrender; for the Copyholder for Life continuing in Possession, and never having been ousted, there could be no Disseisin of that; and he endeavoured to distinguish it from a Surrender to a Disseisor-Lord to the use of another, for in such Surrenders the Lord is only an Instrument, and does but as it were assent, and until admittance the Estate is in the Surrenderer. And he resembled it to the Attornment of a Tenant, when (e converso) a Seignior is granted; and he put Cases upon Surrenderers of Leases, that they must be to one that hath the immediate Reversion, as an Under-Lessee for part of the Term cannot surrender to the first Lessor; and he

cited



cited a Case of Lessee for Years, Remainder for Life, Remainder in Fee to a Stranger, he that had the Fee enfeoffed the Tenant for Years by Deed and made Livery; and the Conveyance held void, for it could not work by Livery to the Tenant for Years, who was in Possession before; and a Surrender it could not be, because of the intermediate Estate for Life, and it could not work as a Grant for want of Attornment. He said it had been commonly received, that a common Recovery cannot be suffered, where the Tail is expectant upon an Estate for Life, (not made Tenant to the Præcipe) which he said was true in a Writ of Entry, in the Possession which are commonly used. And the true Reason is, because such Writ supposes a Disseisin, (which cannot be when there is a Tenant for Life in Possession.) But, as he said, a common Recovery in such case in a Writ of Right would be good.

Pemberton, Chief Justice, said, his reason of Disseisin would overthrow Surrenders to the use of a Stranger; for if the Possession of the Copyholder would preserve it from a Disseisin, then was it pro tempore lopped off, or severed from the Manor, and then no Surrender could be at all. Et adjournatur.

*Perry versus Bowes.*

Ch. Justice  
Jones 196.

**I**n an Ejectment upon a Special Verdict, the Case appeared to be this;

Commissioners of Bankrupt had assigned by Indenture the Lands in question to the Lessor of the Plaintiff, which Indenture was afterwards enrolled: But the Declaration was upon a Demise made after the Indenture, and before the Enrolment, and whether that Demise were sufficient to entitle the Lessor of the Plaintiff, was the general Question?

It was first insisted on, That an Enrolment of the Deed of Assignment, tho' to pass Lands, was not necessary, 2 Co. 26. But the Court over-ruled that, saying, That an Enrolment is not requisite upon an Assignment of Goods, but of Lands it is: But then it was said, That after the Deed was enrolled, it shall relate to the Delivery; and it was compared to a Bargain and Sale, where by the Statute of H. 8. of Enrolments, nothing passeth till the Deed be enrolled; but then it relates. 2 Inst. 675. Bargainee sells before Enrolment, the subsequent Enrolment makes it good; so if the Bargainee suffers a Recovery before Enrolment, he is a good Tenant to the Præcipe by relation, ibidem: And this is confirmed by the common Practice. So if at Common Law a Recognizance be acknowledged before a Judge, (as any Judge of the Courts at Westminster may take a Recognizance) and afterwards he causeth it to be recorded, it binds the Land from the time of the Caption, Hob. 196. If Land be conveyed to the King by Deed enrolled, it

it binds from the time of the executing of the Deed, altho' the Enrolment be some time after.

Saunders contra. Here the Commissioners are under a Power given to them by the Statute of Bankrupts, and they must execute that Power in all Circumstances before it can become effectual. In the case of Enrolment of a Bargain and Sale, the Deed it self passeth the use, and the Statute of Enrolments obstructs the operation of it till Enrolment; but when that is done, it passeth by the Deed. Again, here needs no relation to avoid the mischief of mean Assignments from the Bankrupt, because he is restrained from the time of his first Act of Bankruptcy. And on the other side, the mischief would be very great, if there should be a relation from the Enrolment, in regard the Statute limits no time for the doing of it, so that it may be seven Years after; and if this should relate to punish Mesne Trespasses, the inconvenience would be very great, for such Trespasses are, until the Enrolment, exposed to the Actions of the Bankrupt. As to the Case of the Recognizance, the Caption is a judicial Act and the principal, and so binds from the time. And in the case of granting to the King by Deed enrolled, the Reason is, because the King shall not receive any prejudice by the Laches of his Officer in neglecting to enrol the Deed. But generally in Cases at Common Law there is no relation, as in Case of Feoffment and Libery, but stronger in case of a Grant of Reversion, where the Attornment is but the Assent of the Tenant; yet it shall not relate to the Grant. It would be hard if a Relation should be admitted to make a Man liable to a Trespass. It has been much doubted, whether a Bargainee before an actual Entry, can maintain an Action of Trespass?

Curia. The Case of Bellingham and Alsop, although it was said to be reversed, and the Authority is stirred in Heham and Morrice's Case, 3 Cro. yet it has been since taken for good Law in the main Point. Where Executors sell by an Authority given by Will, the Vendee is in the per from the Devisor, but here in the Post and by the Statute. It were very inconvenient to admit of Relation, because no time prefixed for the Enrolment. Sed adjournatur.

Afterwards Judgment was given for the Defendant.

Anonymus.

**U**PON a Writ of Error out of an inferior Court, in an Action upon the Case, upon an Agreement to assign over a Term, which the Defendant had in him for four Years. Upon Non Assumpsit a Special Verdict was found, That the Agreement was made, but not put into Writing, and they found the Clause in the Act of 29 Car. 2. of Frauds and Perjuries, (viz.) No Action to be brought upon any Contract or Sale of Lands, &c. or any Interest in or concern



concerning them, &c. Upon which Special Verdict found, it was adjudged for the Plaintiff, and now Error was assigned in the matter in Law, that this Contract was within the Act to be put in Writing: But it was objected, That the Statute extended only to Interests, created de novo out of an Estate, and not to an Assignment.

Curia contra, and held the Case to be plain within the Words of the Act, and so the Judgment was reversed.

Anonymus.

Raym. 387.  
388.

**I**n Error to reverse a Judgment given in an inferior Court.

First, Because 'tis said Cur' tenet apud Guildhall Burgi, &c. and not said, That the Guildhall was within the Jurisdiction of the Court. Sed non allocatur; for that shall be intended.

Secondly, The Damages given by the Jury were 3 l. 19 s. and Costs 6 d. and so much for Costs de incremento adjudg'd, and nothing said of the 6 d.

Ante 337.  
348, 350.  
Yelv. 107.  
contra.

Sed non allocatur; because dampna per Jurator' assess' includes ass, and the other is but miscomputation, and the Costs awarded de incremento necessarily implies the 6 d. Costs before included. Vid. ante, Paschæ, 31 Car. 2. 337.

Walburgh and Saltonstall.

1 Sid. 463,  
464.

Ante 12, 18,  
23, 25.

T. Jones 149.

2 Saund. 228,  
229.

1 Mod. 4.

**I**n an Action upon the Case, the Plaintiff declared, That the Defendant did take out a Laritæ 21 Januarii, 32 Regni, ac etiam Billæ, &c. whereas he owed him nothing.

Upon Not Guilty pleaded a Special Verdict was found, That the Laritæ was Teste 28 Novembris, 32 Car. Regis, but was really taken out 21 Januarii, 32 Regis, Et si pro, Quære, &c.

Holt argued upon this, That by Law it must be said to be taken out the 28 of November, when the Teste is. Yelv. 130. Debt upon a Bond bearing date the 30 of December, the Defendant demands Oyer of the Condition which was to perform Covenants, and says, Tho' it were dated the 30 of December, yet it was deliberat' primo die Feb. and no Breach since. If the Plaintiff replies and agrees with the Defendant, 'tis a Departure, because he had declared of a precedent Date, which impleas the Delivery.

But it is objected, That the Jury are not estopped to find the Truth.

I answer, Where the Parties impleading have agreed a Point certain, the Jury is estopped to find the contrary.

Pemberton

Pemberton Chief Justice. We know the course of the Court is to Teste Latitars taken out in the Vacation, of the Term preceding; and the course of a Court is the Law of a Court. He might have declared, That the Defendant sued out a Latitat the 21st of January, Teste the 28th of November preceding, and if he be not estopped to declare so, surely the Jury may find the whole matter. And so Judgment was given pro Quer.

## Termino Paschæ, Anno 34 Car. II.

### In Banco Regis.

Clayton *versus* Gillam.

**I**N Trespass for breaking and entering of his Close, and feeding, &c. and laying thereon certain pieces of Timber, &c. Et continuando Transgressionem præd'. T. Jones 194.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That one of the Trespasses, (viz.) The laying of Timber, could not be with a Continuando.

But it was resolved by the Court, That continuando transgressionem præd' shall be referred only to the Trespasses, which may properly be laid with a Continuando. But if the Continuando had been expressly laid for that Trespass, all would have been naught; as it was resolved in a Case in this Court, between Letchford and Elliot, 16 Car. 2. 1 Sid. 224, 242. Raym, 396. Butler and Hodges, 319, 379.

The Earl of Shaftsbury *versus* Cradock.

**I**N an Action of Scandalum Magnatum for saying, That the Earl was a Traitor, &c. The Action being laid in London where the Words were supposed to be spoken; it was moved in behalf of the Defendant, That the Venue might be changed into some other County, and Affidavits were read, that the Plaintiff had a great Interest in the City, and an intimacy with the present Sheriffs, so that the Defendant could not expect an indifferent Trial there, and thereupon the Court did think fit to take the Cause out of London, and gave the Earl the Election of any other County; but he refused to try it elsewhere, and would rather let the Action fall. Ch. J. Jones 192. Postea 364, 365.



Curtis *versus* Inman.

**I**N Debt for the Penalty forfeited by the Stat. of 5 Eliz. for using the Trade of a Grocer, having not been bound an Apprentice.  
 It was moved, That the Action lies not in this Court, because 21 Jac. cap. 4. enacts, That Actions popular shall be brought before Justices of Assize, of the Peace, &c. But a Case was cited, which was adjudged in this Court, Hill. 20 & 21 Car. 2. between Barnes and Hughes (which see before,) that such Action would lie. But the Court notwithstanding in this Case said, They would hear Arguments.

Ante fol. 8.

The Earl of Shaftsbury *versus* Graham, & al'.Ch. J. Jones,  
198.

**I**N an Action upon the Case in the nature of a Conspiracy, the Declaration was, That the Defendants did conspire to indict the Plaintiff of High Treason, and for that purpose did solicit one Wilkinson; and endeavour to suborn him to give false Testimony against the said Earl, and an Indictment was offered at the Sessions at the Old Bailey in London, by the Defendant in pursuance of the said Conspiracy, which Indictment the Grand Jury there found Ignoramus, &c.

Ante 363.

It was moved in behalf of the Defendants, That whereas the Conspiracy was in the Declaration alledged to be in London, that the Court would change the Venue, and an Affidavit of the Defendants was produced, That the Conspiracy alledged in the Declaration, if there was any such, was in Surrey, and not in London.

(Note, Wilkinson at the time of the supposed Conspiracy was a Prisoner in the King's Bench.) And Affidavits were produced likewise to shew, That the Plaintiff had such Interest with the present Sheriffs of London, that an indifferent Jury was not like to be returned, and that several Persons named to be material Witnesses for the Defendants, durst not come to the Trial, if it were in London, for fear of their Lives, in regard they had been so affronted and abused when they were produced to prove the before-mentioned Indictment at the Old Bailey, and several other matters were alledged. But it was insisted upon by the Counsel for the Earl, That,

First, The Venue uses not to be changed in Case of a Peer who is one of the Comites Regis, and shall not be forced to travel into another County to try his Case as a common Person.

Secondly, That the present Case was local, (viz.) The preferring the Indictment at the Old Bailey; and where the Cause of Action ariseth in two Counties, the Plaintiff hath his Election to bring it in either, 7 Co. Bulwer's Case.

But the Court declared, That they were satisfied, that no indifferent Trial could be had in London; they remembered they were affronted themselves when they were at the Old Baily upon the before mentioned Indictment: And they resolved, That they had a Power to alter the Venue in the case of a Peer, as it had been done about six Years since in a Scandalum Magnatum, brought by the Earl of Salisbury in this Court. And also they said, That the Cause of Action here was Transitory, (viz.) The conspiring, and that the preferring of the Indictment was but in aggravation of Damages; and the Action would lie altho' none had been offered, or if preferred by other Persons than the Conspirators. 2 Mod. 215,  
216.

'Tis true, when the matter ariseth in several places, the Plaintiff has Election, but if there be like to be no indifferent Trial in the place where it is laid, 'tis usual with this Court to change the Venue. But the Court said, They would not confine the Plaintiff to Surrey, if he could shew that that was not an indifferent County. Vid, 42 Ed. 3. 14.

Termino Sancti Michaelis, Anno 34 Car. II.

In Banco Regis.

Denison *versus* Ralphson.

**I**N an Action upon the Case the Plaintiff declared, That the Defendant in consideration of a Sum of Money paid by the Plaintiff, did promise to deliver to him ten Pots of good and merchandizable Pot-Ashes, and that not regarding his Promise, and to defraud him, he delivered him ten Pots of Ashes not merchandizable, but mixed with Dirt. &c. And declared also, That pro quadam pecunie summa, &c. the Defendant vendidit to the Plaintiff ten other Pots of Ashes, Warrantizando, &c. that they were good and merchandizable, and that he delivered them bad, and not merchandizable, knowing them to be naught; and to this Declaration the Defendant demurred. Ante 223

And it was argued by Saunders, That here were Causes of Action of several Natures put into one Declaration, and they required several Pleas, (viz.) Non Assumpsit, and Not guilty, and therefore ought not to be joined together.

Thompson for the Plaintiff cited a Case between Matthews and Hoskin. An Action against a Common Carrier, and declared upon the Custom of the Realm, and that he had not delivered the Goods; 1 Sid. 244,  
245.

332

and



Adjudged  
directly con-  
trary, 1 Sid.  
244, 245.

and declared also in a Trover and Conversion upon the same matter, and after Verdict upon motion in Arrest of Judgment, the Action was adjudged well brought, 16 and 17 Car. 2. Hill. in this Court. So an Action against one for twenty shillings, upon the hire of an horse, and declared further, that he abused him, and held good.

Curia: Those Cases were after Verdict. Causes upon Contract which are in the Right, and Causes upon a Tort cannot be joined, for they do not only require several Pleas, but there is several Process, the one Summons, Attachment, &c. the other Attachment, &c. These upon the Contract lie for and against Executors, the other not; but these seem to be both upon the Contract, (viz.) That upon the Warranty as well as the other, tho' the Declaration, knowing them to be naught, yet the knowledge need not to be proved in Evidence. Debt upon a Bond and a mutuum may be joined in one Action; yet there must be several Pleas; for Nil debet, which is proper to the one, will not serve in the Action upon the Bond. Sed adjournatur.

## Termino Sancti Hillarii, Anno 34 & 35 Car. II.

### In Banco Regis.

Dominus Rex and Higgins & al'.

Raym. 484,  
486.

**A** Quo Warranto was brought against divers Persons of the City of Worcester, why they claimed to be Aldermen, &c. of the said Corporation. The Cause came to be tried at the Bar, and a Challenge was made to the Jury in behalf of the Defendants, for that the Jurymen were not Freeholders.

The Court said, That for Juries within Corporate Towns, it hath been held, That the Statutes that have been made, requiring that Jurymen should have so much Freehold, do not extend to such places; for if so, there might be failure of Justice, for want of such Jurymen so qualified; but then to maintain the Challenge it was said, by the Common Law Jurymen were to be Freeholders.

But the Court over-ruled the Challenge; but at the importunity of the Counsel, they allowed a Bill of Exceptions, and so a Verdict passed against the Defendants; and afterwards it was moved in Arrest of Judgment upon the Point: But the Court would not admit the Matter to be debated before them, (tho' divers Precedents of

of like nature were offered) because they said, They had declared their Opinions before, and the Redress might be upon a Writ of Error.

Termino Sanctæ Trinitatis, Anno 35 Car. II.

In Banco Regis.

Anonymus.

**A** Motion for a Prohibition to a Suit in the Ecclesiastical Court for a Churchwarden's Rate, suggesting that they had pleaded, That it was not made with the Consent of the Parishioners, and that the Plea was refused. 1 Mod. 79, 194, 236.

The Court said, That the Churchwardens (if the Parish were summoned, and refused to meet or make a Rate) might make one alone for the Repairs of the Church, (if needful) because that if the Repairs were neglected, the Churchwardens were to be cited, and not the Parishioners; and a Day was given to them to shew Cause, why there should not go a Prohibition.

Termino



Termimo Sancti Michaelis, Anno 35 Car. II.

In Banco Regis.

Gamage's Case.

**E**RROꝝ out of the Court of the Grand Sessions, where in an Ejectment the Case was upon Special Verdict upon the Will of one Gamage, who devised his Lands in A. to his Wife for Life, Item his Lands in B. to his Wife for Life, and also his Lands which he purchased of C. to his Wife for Life, and after the decease of his Wife, he gave the said Lands to one of his Sons, and his Heirs.

And the Question was, Whether the Son should have all the Lands devised to the Wife, or only those last mentioned? And it was adjudged in the Grand Sessions that all should pass. And upon Error brought it was argued, That they were Devises to the Wife in distinct and separate Sentences, and therefore his said Lands should be referred only to the last.

On the other Side it was said, That the Word *Said* should not be referred to the last Antecedent, but to all. If a Man conveys Land to A. for Life, Remainder to B. in Tail, Remainder to C. in forma prædicta, the Gift to C. is void, 1 Inst. 20. b. It is agreed, if he had said, All the said Lands to his Son and his Heirs, it would have extended to the whole: This is the same, because Indefinitum æquipollet universali. Et adjournatur.

Herring versus Brown.

Postea 371,  
Ante 278.  
280.

**I**N an Ejectment upon a Special Verdict the Case was; Tenant for Life, with several Remainders over, with a Power of Revocation, levied a Fine, and then by a Deed found to be sealed ten Days after, declared the Uses of the Fine, which Deed had the Circumstances required by the Power. The Question in the Case was, Whether the Fine had extinguished the Power?

It was argued that it had not, because the Deed and Fine shall be but one Conveyance, and the Use of a Fine or Recovery may be declared by a subsequent Deed, in the 9 Co. Downam's Case. And a Case was cited, which was in this Court in my Lord Hale's time, between Garret and Willson, where Tenant for Life, with Remainders over, had a Power of Revocation, and by a Deed under his Hand and Seal covenanted to levy a Fine, and declared

declared it should be to certain Uses; and afterwards the Fine was levied accordingly. This was held to be a good execution of the Power and limitation of the new Uses, and the Deed and Fine taken as one.

On the other side it was argued, That the Deed was but an Evidence to what Uses the Fine was intended, and the Power was absolutely revoked by the Fine. Suppose he in Remainder had entered for the Forfeiture before this Deed, should the Defendant have defeated his Right? Et adjournatur. Postea 371. Ante 280

*Hodson versus Cooke.*

**I**N an Action upon the Case for commencing of an Action against him in an Inferiour Court, where the Cause of Action did arise out of the Jurisdiction.

After a Verdict for the Plaintiff, upon Not guilty, it was moved in Arrest of Judgment, That it was not set forth that the Defendant did know, that the Place where the Action arose was out of the Jurisdiction, which it would be hard to put the Plaintiff to take notice of.

On the other side it was said, That the Party ought to have a Recompence for the Inconvenience he is put to, by being put to Bail perhaps in a Case where Bail is not required above, and such like Disadvantages which are not in a Suit brought here; and the Plaintiff ought at his Peril to take notice of the place. Ante 236

And of that Opinion were Jeffreys Lord Chief Justice, Holloway and Walcot; but Wichens contra.

The Court said, That it could not be assigned for Error in Fact that the Cause arose out of the Jurisdiction, because that is contrary to the Allegation of the Record, neither is the Officer punishable that executes Process in such Action, but an Action lies against the Party. And so it was said to be resolved in a Case between Cowper and Cowper, Pasch. 18 Car. 2. in Scac. when my Lord Chief Baron Hale sat there. Read & Wilmott. T. Jones 14, 215. Ante 220. 1 Mod. 81. Kelw. 55. a. 106. a. 2 Mod. 195, 196, 197.

Anonymus.

**A**N Indictment of Perjury for Swearing before a Justice of the Peace, That J. S. was present at a Conventicle, or Meeting for Religious Worship, &c.

It was moved to quash it, because it did not appear to be a Conventicle, (viz.) That there was above the number of Five, and so the Justices of the Peace had no power to take an Oath concerning it, and then it could be no Perjury. To which the Lord Chief Justice said, That Conventicles were unlawful by the Common Law, and the Justices may punish unlawful Assemblies. And he seemed to be of



of Opinion, That a Man might be indicted of Perjury for a Voluntary and Extrajudicial Oath; and cited a late Case, where one had stoln away a Man's Daughter, and went before a Justice of the Peace and swore that he had the Father's Consent, and this in order to get a Licence to marry her; and he was indicted and convicted thereupon.

And all the Court said, That it was not the course to quash Indictments of Perjury, Falsance, or the like; but to put the Party to plead to them.

## Termino Paschæ, Anno 36 Car. II.

### In Banco Regis.

Duncomb *versus* Walter.

Raym. 479.<sup>1</sup>  
3 Lev. 57.

**I**N an Indebitatus Assumpsit by an Assignee of Commissioners upon the Statute of Bankrupts, upon Non Assumpsit pleaded, a Special Verdict was found, upon which the Case appeared to be thus:

One Scaly was arrested by an Executor of his Creditor, 6 Sept. which was before Probat of the Will, and within two or three Days after he paid 1000 l to the Defendant, to whom he stood indebted in such Sum, and after the 18th of September he yielded himself to Prison upon the said Arrest.

The Question was, Whether the Defendant should be obliged to refund this Money which was paid unto him, as aforesaid?

First, Whether the Arrest before the Probat was a good Arrest? It was said, If an Executor hath a Reversion in a Term upon which a Rent is reserved, and distrains. &c. he may abate for the Rent before the Probat. Vid. 1 Roll. 917. tit. Executors. Where an Executor brings an Action before Probat, yet if he shews the Probat upon the Declaration, 'tis well enough.

Secondly, Whether, when he yields himself to Prison, it shall not relate to the first Arrest, to make him a Bankrupt from that time? This depends upon the Statute of 21 Jac. cap. 19. where it is said, That in the Cases of Arrest and lying in Prison, he shall be adjudged a Bankrupt from the time of his first Arrest.

Object. This Relation doth not prejudice Strangers.

Ans<sup>r</sup>. Dame Hale's Case, Pl. Com. 293. If one giveth another a mortal Wound, and then sells his Land, and the person dies; there shall be such Relation as to make the Land forfeited from the first Stroke.

Note, This Case came by Writ of Error out of the Common Pleas, where Judgment was given for Walter; and the said Judgment was affirmed in this Court principally upon the point of Relation: For the Court said, That it would be a great mischief if it should relate to the first Arrest, as to the payment of Money to Strangers.

Termino Sancti Hillarii, Anno 1 & 2 Jac. II.

In Banco Regis.

Herring *versus* Brown.

Quod vid. ante, Michaelmas, 35 Car. 2.

**T**he Case upon a Special Verdict was to this effect; That Ante 368.  
J. S. being seised in Fee had made a Conveyance of his Estate to the use of himself for Life, with divers Remainders over to other persons, with a power of Revocation by Writing under his Hand and Seal, &c.

Afterwards the said J. S. having a purpose to revoke the said Uses, and make a new Settlement of his Estate, he levied a Fine, and after the Fine he made a Deed, wherein he expressed that he revoked the former Uses, and so proceeded to a new Limitation by that Deed, and declared that the Fine by him limited should be to the Uses of the said Deed.

The sole Question was, Whether the Fine had extinguished his Power, and by consequence forfeited his Estate? or, Whether the Fine and Deed should be taken as one Conveyance, and so be a good Execution of his Power, and new limitation of the Uses?

And after many solemn Arguments it was resolved by the Chief Justice Herbert, Holloway and Wright, That the Fine was an extinguishment of his Power, and that the Deed came too late, contrary to the Opinion of Justice Withens. Vide ante, 368.



## A D D E N D A.

Termino Sanctæ Trinitatis Anno 28 Car. II.

In Banco Regis.

Pibus *versus* Mitford.

Intratur Trin, 20 Car. 2. Rot. 703.

1 Mod. Rep.  
98, 121,  
159, 237.  
Raym. 228,  
318.  
2 Mod. 207,  
208, 209.  
3 Keb. 129,  
239, 316,  
338.  
2 Lev. 75.

**I**N an Ejectment the Jury find a Special Verdict to this effect, (viz.) That Michael Mitford was seiz'd of the Lands in question and of divers other Lands in Fee, and having Issue Robert by one Henter, and Ralph by Jane his second Wife, did (23 Jan. 21 Jac.) by Indenture covenant to stand seized of some of the Lands to the use of himself for Life, Remainder to Trustees for years for several purposes, Remainder to Jane his second Wife for Life, Remainder to Ralph and the Heirs Male of his Body. And as to the Lands in question, he covenants to stand seized to the use of his Heirs Male begotten, or to be begotten on the Body of his second Wife, and died. And then the Jury made this Special Conclusion, If any Use did arise by the Deed to Ralph, then they find for the Defendant; and if not, they find for the Plaintiff.

This Case was argued several times at the Bar, and now the Judges delivered their Opinions seriatim.

2 Mod. 211.

Wylde, Justice, for the Defendant.

We are to give our Opinions upon a Deed of Uses, made for the Provision of younger Children not otherwise provided for: But if the Case were not so, It is a safe way, when the Words are ambiguous, to follow the Intention of the Party appearing in the Deed. I shall not maintain that Ralph is a Purchaser, and so make this an Executory Use: I agree, a Man cannot either by Conveyance at the Common Law, by Limitation of Uses, or Devise, make his right Heir a Purchaser; I agree also *Griswold's Case* in *Dyer* 156. and if this Case had operated by Transmutation of Possession, this Limitation to the Heirs of the Body of the Covenantor had been void, and no Use should have risen: But here, in the Case of a Covenant to stand seized, nothing moves out

out of the Covenantor; he retains the Land and directs the Use, and keeps sufficient in him to maintain this Use. There's a great difference between a Conveyance at the Common Law, and a Conveyance to Uses: At the Common Law, the Heir cannot take where the Ancestor could not; but otherwise it is in case of Uses, 2 Rolls 794. and so is Wood's Case, 1 Co. 99. a. cited in Shelly's Case.

This I say to shew, That the Intent of the Parties shall be the Guide, and that there is a difference between Conveyances at the Common Law, and Conveyances to Uses. Horwood's Opinion in Hufley's Case, 37 H. 8. comes to our Case; There's no great difference between a Covenant to stand seized, and a Feoffment to Uses.

I will not argue to prove, That this Deed shall enure as an Executory Use, because 'tis against a Rule in Law taken by my Lord Hobart, and so agreed before his time: But here Ralph is Tenant in Tail, Michael his Father being Tenant for Life, Remainder to his Heirs Male begotten on the Body of Jane his second Wife. For the Law, to preserve this Limitation to the Use of his Heirs Male, &c. will by Implication create an Estate for Life in Michael; because the Intent of the Parties appears, that it should be so. There's no great difference between the Construction of a Deed of Uses and a Will, 13 H. 7. The Wife takes an Estate for Life by Implication, where the Land is devised to the eldest Son after her decease, Manning and Andrew's Case in 1 Leon. 259. \* The Reason of these Cases is the fulfilling of the Intention of the Parties; and here this Limitation cannot be made good by way of a future Use, nor by any other way, but only by creating of an Estate for Life in Michael the Father by Implication, and this is according to the nature of a Covenant to stand seiz'd: For the Use is not to pass out of the Covenantor till the proper time for the subsequent Estate to commence. As to my Lord Pager's Case, 'twas his Intention to have the Use during his Life. And my Lord Coke was certainly very well satisfied with the Resolution in Fenwick and Mitford's Case, when he wrote his Institutes; for he argued before to the contrary, as appears by the Report of that Case in Moor.

\* But if it be devised to one after the death of the Wife, who is not Heir, then the Wife shall not have an Estate for Life by Implication, but the Heir at Law shall enter and hold it during her life. Smartle and Scholler, Ch. Just. Jones Rep. 98. Vaugh. 261. 1 Mod. 159, 160.

Rainsford, Justice, to the same Intent.

If no Use rises immediately to Ralph; yet if a Use rises by the Deed so that he has the Land any way, be it by descent from his Father, 'tis within the Conclusion of the Verdict.

By the scope of the Conveyance it appears, That it was intended, that Robert should never have this Land till Twelve hundred Pound was paid for the provision of younger Children; so that if Robert should have it, it would be against the Intention of Michael.



There are two Reasons and Grounds in Law, by which we may make this Deed agree with the Intention of the Parties.

First, Because it is in the Case of an Estate Tail, *ubi voluntas donatoris observari debet*.

Secondly, It is in a Conveyance settled by way of Use; and in Cases of Uses the Intention of the Parties ought to be pursued; And this is in Case of a Use that rises by Covenant to stand seized, which makes the Case the stronger.

And I conceive this is not a void Limitation, but such an one as gives an Estate to Ralph. In speaking to which I shall observe what my Lord Coke in the 1 Inst. 23. says, viz. That so much of the Use as the Owner of the Land does not dispose of, remains in him, &c. and so in Cownden and Clerk's Case in Hob. 30. And this is the Reason of Bingham's Case, 2 Co. 82.

Now here when Michael covenanted to stand seized to the Use of his Heirs Male on the Body of his second Wife begotten, I conceive he shall retain the Land as parcel of his ancient Use during his Life; for *non est hæres viventis*, according to Archer's Case, 1 Co. And that Michael shall retain an Estate for Life is proved by my Lord Paget's Case, 1 Co. 154. Dyer 310. N. 79. 1 Co. Chudleigh's Case 129. 2 Rolle 788. 21 H. 7. 18.

From my Lord Paget's Case (upon which I shall rely) and the other Cases it appears, That where there's a Limitation to one after the death of another, the Covenantor shall retain the Land during the Life of the other; and here in our Case, this Estate not taking effect till after the Death of Michael, he shall retain the Estate, and shall be Tenant for Life of the old Use.

Now the Question is, Whether Ralph shall take by Descent, or Purchase? And I conceive this Estate for Life, with the Remainder in Tail makes but one Estate Tail in Michael, and that he becomes Tenant in Tail, and so Ralph shall take as Heir in Tail. I shall not trouble my self, whether Ralph may take here as a Purchaser, because in Cownden and Clark's Case in Hob. it is resolved, That he cannot take as Heir Male of the Body by Purchase; because all the Words are not verified in him, for he is not Heir.

I shall rely upon the first Point, That here is an Estate Tail executed in Michael. For when an Estate for Life is in the Ancestor by way of Retainer, and an Estate is afterwards limited to his Heirs, this is within the Rule put in Shelley's Case in 1 Co. where the Ancestor takes an Estate of Freehold, and by the same Conveyance an Estate is limited to his Heirs, Mediately or Immediately, they are words of Limitation, and not of Purchase; because the Heir is part of his Father.

Our Case is stronger than Fenwick and Mitford's Case: It's true, the same Reason for that Case is not given by Anderson and Moor, which is given by my Lord Coke. Moor 437. There the Reason is, because the Limitation to the right Heirs is merely void; here Michael hath an Estate in Tail of the ancient Use, therefore 'tis not necessary for the Law to create an Estate for Life.

Obj. That this cannot be an Estate Tail executed in Michael, because the Estate for Life is not by the same Limitation, but by Construction of Law.

But my Lord Coke says in Fenwick and Mitford's Case, 1 Inst. 22 b. That there is no difference where the Estate is created by Law, and where by the Deed. 1 Anderson 259. And the Law retaining an Estate in Michael for Life, our Case is the same, as if the Estate had been limited to him, with the Remainder to his Heirs Male begotten on his second Wife, which would be an Estate Tail executed in Michael, and would have descended to Ralph.

Twisden, Justice, for the Plaintiff.

I hold there's no Use raised to Ralph by this Deed. We are here in the construction of a Deed, and not of a Will; It may be an Estate should be raised in such a Case by Will, altho' my Lord Hobart is of a contrary Opinion. I agree, the Case of Hodgkinson and Wood, Cro. Car. 23. but it cannot be argued from thence, that it shall be so in a Deed; for a Devise is not to take effect till after the Death of the Devisor, and then 'tis apparent, that he is Heir Male of his Body. It hath been agreed, that Heirs Male of the Body are words of purchase: It is plain, that Ralph cannot take as Special Heir unless by Purchase, and that he cannot do, because he who shall take by virtue of such a Limitation ought to be Heir as well as Issue Male; and Ralph here cannot take by virtue of the Statute de Donis Conditionalibus because none can take as Special Heir, but where his Ancestor took before; and therefore this Limitation is utterly void.

To make this Limitation good, divers ways have been urged.

First, That this Deed has an operation by way of returning of the Use, and it has been compared to my Lord Paget's Case which differs from it; here cannot be any part of the old Use in Michael, for if he hath an Estate for Life, it ought to be a new Use; It cannot be a returning Use, for the Limitation to the Heirs Male of the Body of Jane the second Wife is void, and it cannot be returning where the Use is not settled in any Person. I agree my Lord Paget's Case, because there the Estate was vested in William Paget, and the other Use returned by operation of Law, and the Estate settled could not be divested; but here the Limitation to the Heirs Male being void, the ancient Use remained yet in Michael, for nothing was out of him, he having limited a thing which



which cannot be. And as to the returning Use, tho' all be done in an instant, yet there is a priority of time in the Eye of the Law, for it ought to vest first in him in Remainder, and then return; but here nothing vests in the Remainder.

Secondly, It hath been urged, That it shall be made good by Implication of Law, and so shall amount to a Covenant to stand seized to the Use of the Covenantor for Life, &c. and the rather, as it has been said by Wylde, because Uses are guided by Equity.

Vaugh. 261.  
Postea 379. But I answer, We are here in case of a Deed, where an Estate shall not be raised by Implication, as it shall by a Will, Cro. Car. Seagood and Hone 336. A Deed differs greatly from a Will, for if a Man surrenders Copyhold Land to two, equally to be divided, they are Joint-tenants; but such a Devise would have made them Tenants in Common. Admit in some Cases an Estate shall be raised by Implication in a Deed; yet it shall not be so here, for it would be to the disinheriting of the Heir: As to the case of 13 H. 7. I agree, that a Devise to the eldest Son, after the Death of the Wife, gives an Estate for Life to the Wife; but otherwise it would be upon such a Devise to the younger Son, for there the eldest Son, and not the Wife, should have the Estate in the mean time, Cro. Jac. Horton and Horton 57. We are not here in favorable materia, and therefore no construction shall be made, which does not appear by the words. It hath been strongly urged, that this being by way of Use (which is a matter of Equity) shall be favoured. Admit it; yet it shall be guided by the Common Law, for æquitas sequitur legem, There never shall be a Settlement by way of Use to make one capable who is not capable by the Common Law. I do not see any difference between a Feoffment to Uses, and a Covenant to stand seized; for if a Feoffment be made to the Use of one for Life, the Use shall return which is not disposed of, as well as upon a Covenant to stand seized.

Ante 323.  
2 Cro. 75.  
Vaugh. 5, 6,  
7, 262, 264.  
Chief Just.  
Jones 98.

Postea 378.

Thirdly, It has been urged, That if these severally cannot support this Limitation; yet the Intention operating with the Deed, will both together make an Estate for Life in Michael. But I do not see his intent here to have it for Life; the intention even in a Will, which is much stronger, ought to be collected out of the words of the Will. Cro. Car. Sprit and Bence 368. agreed by the whole Court, That words in a Will ought to have an apparent intent to disinherit an Heir, and here there is not any apparent intent, but rather to the contrary; for of some Lands Michael covenants to stand seized to the Use of himself for Life, Remainder, &c. but of the Lands in question, he makes a difference in the Limitation: And the words of the Deed are to be considered, he covenants to stand seized to the Uses, mentioned, declared and limited in the Deed, and if Michael shall have an Estate for Life, he must have

Ante 323.  
Vaugh. 3, 4,  
5, 6, 262.  
1 Sid. 191.

it by operation of Law. There was a like case between Flavil and Ventroile in the Common Pleas, in which the Court was divided; but the same Point came afterwards in question, in the Case of Mr. Tape of Norfolk, and it was adjudged to be the ancient Use; And no Case can be shewn, that the Law will create an Estate in the Covenantor, where the Use is not vested in any Person, but the ancient Use remains in him.

As to the Cases cited on the other side, I have answered my Lord Payer's Case already. And as to my Lord Coke's Case, 1 Inst. 22. b. I agree the Use returns, and the Son is in by descent and so it was adjudged in Fenwick and Mitford's Case there cited: But the Paraphrase he makes there I do not understand; It is said there, When a Limitation is made to his right Heirs, and right Heirs he cannot have during his Life, the Law doth create an Use in him during his Life: Wherefore is this said? to make the Heir in by descent? No doubt without this he is in by descent, and so was the Judgment in that Case; for what Reason then should there be an Estate for Life raised by the Law, to be merg'd by the Fee as soon as raised? Postea 379.

And there 'tis said, Till the future use come in Esse, I do not conceive then where it is so long as the Father lives, and what he means by the future Use, I do not know, for it always was in Esse, and never was out of the Feoffor, and this was so adjudged in that Case of Fenwick and Mitford, and not the construction of my Lord Coke: And 'tis strange, that no other Reports should mention his construction.

Hale, Chief Justice, for the Defendant.

If Ralph takes either by descent from Michael, or by Purchase, the one way or the other answers the Verdict, and Judgment ought to be given for the Defendant.

I shall divide the Case into two Points.

1. If he takes by descent?

2. Admitting he does not, if he may take by Purchase? As this Case is I shall premise two or three things.

First, It has been agreed, if an Estate for Life be raised to Michael, the Remainder being to his Heirs Male of the Body of Jane his second Wife, the Estate Tail is executed in him; be the Estate for Life raised by Implication or express Limitation.

Secondly, It is plain, quacunq; via it be raised, that the Estate was lodged in Michael, till Ralph the Son be in a capacity to take it, either by Descent or Purchase; for be it part of the ancient Use, or a new Use, it ought to be in Michael during his Life, for there is nothing to bring it out of him.

Thirdly,



Ante 376.

2 Mod. 209.

Thirdly, In all Cases touching Uses, there is a great difference between a Feoffment to Uses, a Covenant to stand seized, and a Conveyance at the Common Law. If a Man by Feoffment to Uses conveys Land to the use of J. S. for Life; he may remit the Use to himself and the Heirs Male of his Body by the same Deed, and so alter that which was before a Fee simple, and turn it into another Estate; but if A. gives Land to B. for Life, Remainder to A. and the Heirs Male of his Body; because a Man cannot give to himself, the Remainder is void, for a Man cannot convey to himself by a Conveyance at the Common Law.

These things being premised, I conceive here is an Estate Tail in Michael.

First, Because in this Case the Use returns by operation of Law, and executes an Estate in Michael for Life, which being conjoined to the Estate limited to the Heirs Male of his Body, makes an Estate Tail: This Estate for Life rising by operation of Law, is as strong as if it had been limited to him for his Life, and after his decease to the Heirs Male of his Body.

1 Mod. 98.

Secondly, Because that a Limitation to the Heirs Male of his Body is in Construction of Law, a Limitation to himself and the Heirs Male of his Body. There is a great difference, when he who has the Use, limits it to A. for Life, the Remainder to the Heirs of the Body of B. here no Estate can rise to B. because nothing moved from him, but where he who has the Estate limits it to the Heirs Male of his own Body, ut res valeat, he shall have it for his Life.

Hob. 125, 277.

Thirdly, It is plainly according to the Intent of the Parties; for the Intent perfectly appears, that the Issue by the second Wife should take, and that Robert the eldest Son should not take till so much Money be paid; therefore, if we can by any means serve the Intent of the Parties, we ought to do it as good Expositors. For, as my Lord Hobart says, Judges in Construction of Deeds do no harm, if they are astute in serving the Intent of the Parties without violating any Law.

Obj. Here the Use being never out of Michael, he hath the ancient Use which is the Fee-simple, and consequently being the ancient Use, and this being a new Limitation to the Heirs Male of his Body, the ancient Use and the new one cannot be pieced to make an Estate Tail executed in Michael, but it shall be a Contingent Use (if any) which ought to rise to the Heir Male of his Body, and so remains the ancient Fee simple. And it hath been compared to these Cases. If a Man covenants to stand seized to the Use of J. S. or of his Son after his Marriage, or after the Death of J. D. these are Contingent Limitations, and there is a Fee simple determinable in the Covenantor to serve the future Uses.

Ans<sup>r</sup>. 'Tis true, if a Man covenants to stand seized to such Uses, as that he leaves a descendible Estate in himself: As if a Man covenants to stand seized to the Use of his Son, from and after his Marriage, this is purely a Contingent Use, because 'tis possible the Marriage may never take effect, and nothing is fetch'd out of the Covenant; so if he covenants to stand seized to the Use of J. S. after 40 years, there is a Fee simple determinable in the Covenant, and therefore those Cases are not to be resembled to our Case, where the Estate of Michael cannot continue longer than his Life. And this without any wrong done to any Rule of Law, may be turned to a Use for Life, and therefore such construction shall be.

Obje<sup>c</sup>t. 2. Here is an Estate to rise by way of Use by a Deed, and not by a Will, which shall not be by Implication by a Deed. Ante 376.

Ans<sup>r</sup>. It's a certain truth: But we are not here upon raising an Estate by Implication, but qualifying an Estate that is now in the Father, which by this new Deed is to be qualified to be an Estate for Life, to preserve the Estate Tail, so that the Cases of Implication are not to the purpose.

Obje<sup>c</sup>t. 3. In this Case Michael shall be in of his ancient Estate in Fee-simple which is in him, and not of a new Estate created by Implication of Law; and it hath been compared to the Devise of Land to a Man's Heir, he shall not be in by the Devise, but of his ancient Estate, that would have descended to him,

Ans<sup>r</sup>. True: But in this Case a Man may qualify his Estate, as in Gilpin's Case, Cro. Car. 161. Devise to his Heir, upon condition, that he shall pay his Debts in a year, the Heir is a Purchasor; so here is a qualification to turn the Estate of Michael into an Estate for Life, ut res valeat.

Obje<sup>c</sup>t. 4. Michael had not an Intention to have an Estate for Life, for in the Limitation of the other Lands, he has limited them expressly to himself for Life, and if he had intended to have had an Estate for Life in the Lands in question, he would also have so expressed it.

Ans<sup>r</sup>. The Intention will not controul the Operation of Law; his main Intent was to settle the Lands upon his younger Children, this the Law serves but not his secondary Intentions; If a Man covenants to stand seized to the Use of himself for Life without impeachment of Waste, and afterwards to the Use of the Heirs Male of his Body, the Law supervenes his intention, and makes him to be Tenant in Tail. And in our Case there was a necessity to limit the other Lands to himself for Life, because there was another Estate to intervene the Estate for Life, and the Estate Tail. The Reason given by my Lord Coke, in Fenwick and Mitford's Case is plain enough, and it appears that he was of that Opinion afterwards by the Report of Pannel and



Lane's Case, 13 Jac. in Rolle Rep. 1 part 238. The Case upon which I shall rely, which has not been answered, is my Lord Paget's Case, adjudged by all the Judges of England.

1 Leon. 194.  
1 Cro. 154.  
a. in the Re-  
ctor of Che-  
dington's  
Case.

Tho. Lord Paget covenants in consideration of the discharge of his Funerals and Payment of his Debts and Legacies out of the profits of his Land, and for the advancement of his Son, Brother and others of his Blood, that he and his Heirs would stand seized of divers Manors to the Use of T. F. one of the Covenanters, for the Life of my Lord Paget, and after his Death to the Use of C. Paget for the Term of 24 years, and then to the Use of W. Paget his Son in Tail, with Remainders over; and afterwards the Lord Paget was attainted of Treason. And it was adjudged, that the Lord Paget himself had an Estate for his Life, for the Remainder being limited after his Death, the Estate cannot pass out of him during his Life; and there in Case of a Covenant to stand seized, he himself hath an Estate for Life: And this is not because the Estate returns, as my Brother Twisden has said, but because the Estate was never out of him, and cannot return either from the Heir or the Covenantee; otherwise where should it be during the Life of the Lord Paget who was attainted? The Book is, that it was never out of him, but was turned into an Estate for Life; so that now it is all one, as if he had covenanted to stand seized to the Use of his eldest Son after his Death. And the question is, What Estate he has during his Life? It is adjudged that he has an Estate for Life; for if there had been a Contingent Fee simple in the Lord Paget, his Heir could never have had an Amoveas manus; for if a Man covenants to stand seized to a Contingent Use, and afterwards is attainted of Treason before the Contingency happen, the Contingency shall never rise, for the King has the Estate discharged, and the Use is to rise out of the Estate of the Covenantor; so is Moor, Sir Tho. Palmer's Case 815. In Moor's Rep. of my Lord Paget's Case, 194. it's said, That W. Paget had an Amoveas manus for the Estate of the Queen leased by the Death of my Lord Paget. In Sir Francis Englefield's Case, Popham 18. n. 7. it's resolved, That no Use rises, because 'tis that it shall descend, remain or come, which is uncertain; but if he had covenanted, that after his Death he and his Heirs would have stood seized to the Use of John, an Use would have resulted to Sir Francis.

**Second Point.** I conceive if it be impossible for Ralph to take by Descent, this would be a Contingent Use in him by Purchase.

The great Objection against this is, that the Limitation is to an Heir; and an Heir which ought to take by Purchase, ought not to be only Heir of the Body, &c. but Heir general. Of this I am not well satisfied: I conceive the Remainder being limited to the Heirs of the Body of Jane begotten by Michael, such a Limitation will make a special Heir to serve the turn, and 'tis not to be resembled to Shelley's Case. My Reasons are,

First, Because at the Common Law, before the Statute de Donis, notice was taken, that this was a special Heir, and therefore 'tis no wrong done to make him here a qualified Heir. In the Statute de Donis 'tis said, When Lands are given to a Man and his Wife, and the Heirs of their two Bodies begotten.

Secondly, Upon the special penning of the Deed it is apparent, that Michael took notice that he had an Heir at Common Law, therefore it can't be intended that he meant here such an Heir that should be Heir general to him; this would be Contradictio in Adjecto. Litt. Sect. 352. puts this Case; If a Feoffment be made upon Condition, that the Feoffee shall give the Land to the Feoffor and his Wife, and the Heirs of their two Bodies begotten; in this Case, if the Husband die, leaving his Wife, before the Estate Tail is granted to them, the Feoffee ought to make the Estate as near the Condition and as near the intent of the Condition as may be, (viz.) To let the Land to the Wife for her Life without impeachment of Waste, the Remainder to the Heirs of the Body of her Husband on her begotten; If the Husband and Wife die before the Gift made, then the Feoffee ought to make it to the Issue and to the Heirs of the Body of his Father and Mother begotten. Suppose that this had been to a second Wife, and there had been Issue by a former, the Book of 12 H. 4. 3. says, That there it shall be in another manner; but Lit. says it shall be as near, vid. Litt. Sect. 22. Morevil's Case, Fitzh. Tail 23. 2 Ed. 3. 1. 4 Ed. 3. 50. By all these Cases it appears, That no regard is had whether the Son be Heir of the Husband, if he be the Heir of their two Bodies. Therefore it seems, that by this Limitation Ralph shall take by way of Contingent Remainder: For Heirs of the Body of the second Wife is a good name of Purchase. I have not read any Case against this. Hill. 16. or 26 Eliz. there was this Case. A Man taking notice in his Will, that his Brother (who was dead) had a Son, and that he himself had three Daughters who were his right and immediate Heirs, he gave them 2000 l. and gave his Land to the Son of his Brother by the name of his Heir Male. Pro-



vided, If his Daughters troubled his heir, then the Devise of the 2000l. to them should be hold. And it was resolved, That the Devise taking notice that others were his heirs, the Limitation to his Brother's Son by the name of heir Hale was a good name of Purchase, and this agrees with Cownden and Clerk's Case, in Hob.

Wylde, Justice, said, he was of the same Opinion with Hale in this last Point. And Judgment was given for the Defendant.

Three

Three Learned  
**ARGUMENTS,**

One in the  
**Court of King's Bench,**

BY

Sir *FRANCIS NORTH*, Attorney General;

And Two in the

**Court of Exchequer,**

BY

Sir *MATTHEW HALE*, Chief Baron there.

The Argument of Sir *Francis North*.

In Banco Regis.

Potter and Sir Henry North.

**I**n a Replevin for taking of an horse in a certain place called the Fen, at Mildenhall in the County of Suffolk; the Defendant makes Cognizance, as Bailiff to Sir Henry North, and saith, That the place where, &c. containeth ten Thousand Acres of Pasture in Mildenhall, whereof a certain place called Delfe is parcel, and that it is Sir Henry North's Freehold, and the horse was Damage feasant there, &c.

Ante 163,  
 164.  
 Vaugh. 251.  
 1 Saun. 347,  
 &c. 350.  
 1 Lev. 253,  
 268.  
 2 Keb. 513,  
 517.  
 2 Lev. 2.  
 2 Saun. 320,  
 &c. 324.  
 1 Mod. 74.  
 2 Keb. 757,  
 842.  
 Similis Ca-  
 sus.  
 The Carter 199.



The Plaintiff replies, Confessing the Soil to be the Freehold of Sir Henry North, but says, That time whereof, &c. the place Where hath been parcel of the Fen, and parcel of the Manor of Mildenhall, of which Sir Henry North is seized in Fee; and that the Plaintiff was at the time, &c. seized of an ancient Messuage, (one of the Freeholds,) holden of the Manor, by Rents and Services, and parcel of the said Manor; and that Time out of Mind there were divers ancient Freehold Messuages, holden of the said Manor, by Rents and Services, and divers Copyhold Messuages, parcel of the said Manor, by Custom of the said Manor, demised and demisable by Copy of Court-Rolls of the said Manor.

3 Mod. 150. And the several Tenants of the said Freehold Tenements being seized in their Demesne as of Fee; and those whose Estate they have in the same, time out of mind have had, together with the Customary Tenants of the said Customary Tenements, the sole and several Feeding of 100 Acres of Pasture for all Beasts, except Hogs, Sheep and Northern Steers, levant and couchant upon their several Freeholds every year, at all times of the year, as to their several Freeholds belonging.

3 Mod. 250. And that within the said Manor there is, and Temps dont, &c. hath been such a Custom, That the several Tenants of the Customary Messuages, together with the Freeholders also, have used and accustomed to have the sole and several Feeding of the said 100 Acres of Pasture for all their Beasts, except Sheep, Hogs, and Northern Steers, levant and couchant upon their several Copyholds every year, at all times in the year, tanquam ad separata Tenementa customaria spectant & pertinent; and the Plaintiff being seized put in his Horse, &c. and so justifies.

Ante 163,  
164.  
Vaugh. 251.

Upon this the Defendant demurs generally.

This Prescription is naught in substance, and Judgment ought to be given for the Defendant, upon these Four Exceptions:

First, That several Freeholders cannot join, or be joined in a Prescription to claim an entire Interest in another man's Soil, as annexed to their several Estates.

Secondly, The Interest of sola & separalis Pastura, is an entire Interest, and cannot be claimed both by Prescription and Custom.

Thirdly, That the Owner of the Soil cannot be wholly excluded out of the Soil at all times, as this Prescription and Custom import.

Fourthly, This is a new Invention in Pleading, framed to overthrow a Maxim in Law, and is of mischievous Consequence.

Tho' but one Man pleads, yet 'tis a Joint Prescription that he justifies by, and he involves all their Estates in his Prescription, and prescribes for the whole thing belonging to all their Estates; so that 'tis the same thing in substance, as if they had joined in Pleading.

If he had pleaded, That he, together with all the Freeholders and Copyholders, &c. he had prescribed alone, and only for himself; but that would have been naught, because the sole Pasture cannot by any Title or Prescription be annexed to their several Estates, as shall be shewn afterwards.

First, I shall consider the Nature of the thing.

Secondly, The Rules of Prescription.

Thirdly, Examine the Case by those Rules.

First, I admit that there is a sole and several Pasture, and that it lies in Prescription. Cases are frequent, where one man hath the first Crop and the Soil, and another man hath the Pasturage or sole Feeding till the Sowing again, &c. Hutton 45.

I conceive it to be in it's Nature a certain and determinate Interest or Profit; I mean in distinction to an uncertain Profit a prender.

To have Common or Pasturage for Beasts levant and couchant upon such Land, or to have Estovers to be spent in such an House, without any determinate quantity or number, I call uncertain; for it is to be measured only by Use and Occasions.

But to have Pasture or Common for 100 Sheep, or Estovers of a certain quantity, as ten Load of Wood, is certain every year, and differs very much in it's Nature from an uncertain profit a prender.

As for Example: The Levancy and Couchancy is not traversable, nor the employment of Estovers certain, because that no Surcharge can be to the Owner. *Yelv. 188, 189.* 2 Saun. 327.

It may be granted from the Land a que, 2 Cro. 15. Drury and Kent; for the same Reason, in case of a sole Pasturage, the Party that claims it having a general Interest, and the Owner being wholly excluded, it is not material with what Cattel it be taken tho' they prescribe with an Exception of some, for if there be an Overplus the Owner cannot have it.

Now as there may be such an Interest, so I admit that several persons may have it; but it must be as Joint-tenants or Tenants in Common, where they have several Rights by Moieties and Parties: But several men cannot claim the Entierty of this profit by Prescription, as I shall after shew. If such a profit a prender as this be annexed to Land, 'tis appurtenant by Prescription or Grant; and if part of the Land a que, &c. is aliened, the Entierty cannot belong to both their Estates, but there shall be an apportionment, (scilicet) the Alience shall have the same proportion for the

<sup>1</sup> Saun. 352.

<sup>2</sup> Saun. 327.

Vaugh. 252.



the sole Passurage, that he has of the Land a que, &c. in the same manner as it would be in a Case of Common appurtenant certain, for which there will be an apportionment in such cases, as was adjudged 7 Jac. inter Moreton & Woods, 1 Rolle 235.

Having said this concerning the Nature of the Interest demanded, I will now speak concerning the Nature and Rules of Prescription.

A Prescription that is to claim a real Interest of Profit in solo alieno, is a Title, and as a Title must be strictly and curiously pleaded, and is not like Prescriptions that are by way of Discharge, and for Easements, or for Matters of personal Exemption or Privilege.

A man may lay a Prescription in a great many, where it tends but to claim an Easement or Discharge, and not Matter of Interest and Profit. 15 E. 4. 29. 18 E. 4. 3. to say, That all the Inhabitants have had such an Easement, &c. or, to have been discharged, &c. will be well: And for Matters of Privileges a Prescription may be in General; for it is but a Matter of Exemption, and Personal, and is called a Prescription in distinction to a Custom; because Custom is meerly local, and this is to persons, yet having respect to such a place, as all the Citizens, &c. as in Day and Savage's Case in Hob. Rep. Or having respect to such a Condition, as All Serjeants at Law, or all Attorneys of such a Court, such Prescription must be in generality, to express the extent and nature of the Privileges, and so always have been allowed.

But a Prescription to claim a Profit, or an Interest, in alieno solo, is a Title; and as in setting forth Titles the Law is curious in pleading, and lays down strict Rules, which must be observed; so in pleading such Prescriptions, the Rules taught in our Books, and the Course of pleading hitherto used, must be followed.

One Rule of such Prescription is, That the Thing prescribed for by a que Estate (not in gross, but appendant or appurtenant) must agree in the Nature and Quality of the thing to which it is annexed or appurtenant. Corporeal things cannot be appurtenant to Corporeal, because they are distinct, and can have no relation one to another. Estovers of Wood cannot be appurtenant to Land, because they cannot be used for it, 1 Inst. 121. b. 122. a. If a Man would plead, That he and all those whose Estate, &c. in Black-Acre, &c. Time out of mind, have had ten Load every year, to be taken, &c. tanquam spectant, &c. upon Demurrer this would be naught; because it does not agree with the Rules of Law. And Usage may be objected in that case; but Usage alone makes but a Title in gross, which will serve when it was Time out of mind continued in the same hereditary Line.

Uſage cannot annex a Thing that cannot in nature be uſed with the Thing to which it ſhould be annexed.

One other Rule of Preſcription for Matters of Inter-eſt is, That nothing can be preſcribed for, that cannot at this day be raiſed by Grant.

For the Law allows Preſcriptions but in ſupply of the loſs of a Grant. Ancient Grants happen to be loſt many times, and it would be hard that no Title could be made to things that lie in Grant but by ſhewing of a Grant: Therefore upon Uſage temps dont, &c. the Law preſumes a Grant and a Lawful beginning, and allows ſuch Uſage for a good Title; but ſtill it is but in ſupply of the loſs of a Grant: And therefore for ſuch things as can have no Lawful beginning, nor be created at this day by any manner of Grant, or Reſervation, or Deed that can be ſuppoſed, no Preſcription is good. 11 H. 7. 13, 14. 13 H. 7. 16. per Keble. 21. H. 7. 40.

Preſcription for a Lord to have ſo much for every Pound-<sup>21 H. 7. 40.</sup> breach is a good Preſcription to bind the Tenants, but naught as to Strangers; becauſe as to the Tenants it might have a good beginning by way of Reſervation, but as to a Stranger it could have no Lawful beginning by way of Grant, or Reſervation, or any way that can be imagined.

Now if we can examine the Preſcription in the Caſe in Queſtion, by theſe Rules, we ſhall find;

First, That the Thing preſcribed for does not agree in the nature and quality, nor is applicable to the Thing to which it is annexed.

The Thing preſcribed for is an entire, determinate Inter-eſt; and<sup>Ante 164.</sup> the Thing to which it is annexed is ſeveral Eſtates that have no relation one to another; the Uſage of one can have no relation to the Uſage of another.

I would put this Caſe. In an Action of Treſpaſs, the Defendant juſtifies for Eſtovers certain, or Paſture certain in this manner (viz.) that he is ſeized of a Meſſuage, &c. in Fee, and that J. S. is ſeized of another Meſſuage, &c. in Fee, and that he and J. S. and all they whole Eſtates they have in the ſaid two Meſſuages, have had ten Load of Wood, &c. or Feeding for 500 Beaſts: Or, if two Lords of ſeveral Manors in Fee join in preſcribing for a certain Rent, under ſavour it were abſurd and never was known or allowed; for the Things to which, &c. being ſeveral, the Uſage of neceſſity muſt be ſeveral, and the Preſcriptions alſo muſt be ſeveral: As for Example, For one of them to preſcribe for a Moiety, &c.

The Reaſon why a Man cannot preſcribe to have Eſtovers<sup>4 Co. 39. a.</sup> of Wood to Land is, becauſe there can be no Uſage to annex it; for it cannot be uſed with it; and in all Caſes Preſcription follows



the nature of the Usage; and therefore in the Case at Bar, the Usage being several, and the Estates several, the Prescription ought to be several also.

It is impossible to raise such an Interest by a Grant at this day; for if such a Grant were now made, either the Grantees would be Joyntenants of this Interest, and then there would be a Survivorship, or else they would be Tenants in Common of it, and their several Interests might be annexed to their several Estates by Purparties or Apportionment: And so it would be in the nature of several Grants; and there must be to several Prescriptions several Men that have had Land time out of mind, yet cannot join in making a Title, but must make it severally. As for Example:

If there be Three, one of them must say, That his Father was seized of a Third part that descended to him, and so make a Title against a Stranger, tho' there be a joint Possession: And if he be to make a Title against his Companions, he may say, That he and all those whose Estates they have in the other Two parts; they cannot say, That their three Fathers were seized of the Lands, and shew the several Descents; nor, That they Two, and all whose Estates they have in Two parts in Three to be divided, have held in Common.

For the Title of the one concerns not the other; they are upon Lines and Descents: And Prescription is making of a Title, as was said before; and the Law is as strict in it, or rather more strict than in making of a Title to Land.

Therefore several Men that have several Estates, and no Relation one to another, cannot join in making a Prescription; for the Prescription of one does not concern the other.

Rastal's Entries 622. d. en Trespass, &c. Two Commoners (to avoid prolixity and repetition) do, as near as they can, join in a Prescription; but being considered, it is a several Prescription, as much as if they had justified severally.

By Lord Coke's Rule on Littleton 197. a. That Tenants in Common may join in an Assize for an entire thing, as an Hawk, or an Horse for the necessity of the case. It may be objected, that there is the same necessity here; I answer,

That tho' in that case they join in the Demand and the Action, yet they must make their Titles severally as they are, they must sue as they may recover, which cannot be half an Hawk, or half an Horse; but when they come to make their Titles in Pleading, they must set them forth distinct; there the possession is joint and cannot be severed; but in our case the possessions are several, and one hath nothing to do with the other, and the thing claimed is in its nature severable, either by Joicties, Purparties or Apportionment.

It

It may be objected against my Rule, That a Prescription must be, as a Grant may at this day be made, that (11 H. 7. 13, 14.) a man may prescribe against a great many as Tenants, or a Commonalty, without naming a Party certain; and such a Prescription cannot spring out of one Grant no more than this. For if a great many may join in one Grant, yet it is so many several Grants as to their several Interests; and so it may be said, there ought to be so many several Prescriptions.

I answer, The Rules are not alike: For if 100 Men, being a Generalty, (as all the Tenants of the Manor of Dale) make the same kind of Grant to J. S. or there be the same kind of Reservation, and the thing claimed be annexable to the Estate of J. S. these all unite in the Grantee and his Estate, and the Estate continues entire: Time knits and unites it, and an entire Prescription will serve, being it will serve the Case.

But when a Grant is made from one to many that have several Estates, their Estates are carried and descended several ways, and Time and Usage makes them distinct and several, and cannot be severed by the same Prescription.

But the Prescription at the Bar is worse upon my second Reason; for Prescription and Custom are of contrary Natures and incompatible, and cannot give Being to the same thing.

Prescription is a Title presuming a Grant to the Freeholders, and a Lawful beginning. The Copyholders claim by Custom, because they are but Tenants at Will and not capable of a Grant; then this must be raised from the Lord by parcels, which being an entire thing it cannot be: For whichsoever should be raised first, the rest must be left in the Lord, who cannot have a Right of sole Pasturage in his own Soil distinct from the Soil. 6 Co. 60. b.

It may be objected here, That Custom and Prescription are not of such contrary Natures as I make them; for in Day and Savage's Case in Hob. 85. the Pleadings were as a Custom of the City, and the Court adjudged it to be a Prescription; which shews, that Custom and Prescription differ not so much in the nature of the Thing, as in the manner of the pleading. Cr. El. 363.  
Cr. Jac. 152.

For Answer, I need but observe the Nature of that Case. The Officers of the City of London justified for a Duty of Wharfage claimed by the City. The Plaintiff sets forth in his Replication, That within the City there is a Custom for Freemen to be discharged, &c. and the Question was, Whether this was a Custom to be tried by the Mouth of the Recorder, or a Prescription to be tried per Pais? It was held to be in its Nature a Prescription; and if it were not, that it was adjudged that it ought not to be tried by their Certificate who were concerned in Interest.



The Prescription there meant by the Court, was not a Prescription to claim a real Interest, as in this Case; but it was (as I may call it) a local Prescription to privilege Persons in a certain Place and Condition, which is in its Nature betwixt a Prescription and a Custom; and not a Custom, because it concerns the Discharge of Persons, and it is merely Local; nor a Prescription, because it is not annexed to any Estate nor to any Person; but in relation to a certain Place and Condition. And yet it is rather termed a Prescription; for it is said, That Inhabitants may prescribe for an Easement or a Discharge; but a strict Prescription to make Title to a Real Interest is so nice, that it cannot be pleaded by way of Custom, nor confounded with it, Inhabitants, or Freemen, or Citizens, cannot prescribe in that kind.

I must add to strengthen my Reasons upon these two Matters, that no Precedent can be shewn in all our Books of any such Case, either where two Freeholders join to claim a Real Interest in solo alieno, or where Prescription and Custom are mixed as in this Case.

It will be no Objection that it cannot be pleaded better, when it appears the very thing cannot consist with the Principles of Law; for tho' there be such a thing as several Pasture, which may be appurtenant to a Messuage, yet it cannot be annexed to the Estates of so many several Freeholders and Copyholders; But if the thing were consistent with Principles of Law, the pleading here is naught, to mix a Prescription and a Custom together, which are incompatible.

The whole ought to have been laid by way of Custom, it being an entire thing, and the necessity of the Case would have maintained it.

If J. S. makes a Feoffment to the Use of the Feoffee and Feoffor and their Heirs, one cannot be in by the Common Law and another by the Statute of Uses; but both shall be in by the Statute of Uses. So here, the Entire thing not being to be maintained, possibly both Prescription and Custom should have been laid by way of Custom; for the Freeholders in case of Necessity (it may be) might claim by Custom, tho' the Copyholders could not prescribe.

Ante 164.

Thirdly, My third Reason is, because the Owner of the Soil can by no Prescription or Custom be excluded out of his own Soil at all times of the year. And this Reason I principally depend on, because it strikes at the very Root and Essence of the thing.

I know there are many Cases, in our Books, of Wages, that have been allowed in restraint of the Owner of the Soil; I shall not oppose any of them, but admit them all; yet oppose this Pre-

Prescription of which I may confidently say, there is not one Precedent in all our Books.

I will admit the Lord or Owner may be excluded for a certain time, according to the Books, Fitzh. tit. Prescription 51. Hutton's Rep. 45. Pitt and Cheek's Case, and the same Case 6 Co. by the name of Spark's Case, and Co. on Litt. 122. a. where he says, a Man may prescribe to have solam vesturam, from such a day to such a day, and thereby the Owner of the Soil may be excluded from feeding there; so he may prescribe to have Separalem pasturam, and exclude the Owner of the Soil from feeding there.

I know that they object, that my Lord Co. is to be understood as to Separal' pastur, that it may be at all times in the year, because he does not restrain it as he does the solam pasturam. But certainly the Law is the same for the one as for the other, and the Books must be intended for the one as well as for the other, for coming immediately next, there needed no Repetition for the latter, but the (so) signifies in the same manner, and so understood I admit it.

I admit the Lord or Owner may be stinted as to his kind of Cattle; and have none but Sheep or Horses, and so he may be stinted to a certain number, according to Kenwrick and Pargiter's Case, Yel. 129. 2 Cro. 208.

I admit the Lord or Owner may be excluded as to some kind of profits: Another Man may prescribe to have omnes Spinias up-<sup>8 Co. 136. b.</sup> on such a Waste according to Dowglas and Kendal's Case, Yelv. <sup>2 Brown. 149.</sup> 127. 2 Cro. 256.

And for this Reason, a Man may prescribe to have solam piscariam upon another's Soil; for there he leaves the Owner the profits of the Soil for Manuring of his Ground or Ballastage, which the Owner has besides the Property and the use of the Water; so that he leaves enough for the subsistence of the Fish.

Now, I shall agree further, that the Lord may be excluded wholly from the feeding of his Ground, upon Special Matter shewn to the Court, whereby it may appear that the Lord has some recompence, or takes the profits some other way; as if there be a Park or Forest where the Lord has the Game, another Man may prescribe to have the Herbage, for the Lord has considerable profits of the Ground by his Deer, which is so considerable, that if the Franchise comes to be determined, it hath been held that such a Prescription for Herbage, being but surplusage after the feeding of the Deer and subordinate to it, shall rather be lost than carry the whole profit of the feeding and exclude the Owner. And it has been the Case of many Parks, that have been disparked by the King after the Herbage granted away; so if there be Mines opened, or any other profit that appears to the Court to be left to the Owner.

I



I do not oppose, but that the pasturage may be claimed by prescription.

But to have the Sole pasturage of all Pasture Grounds at all times in the year, is to have the whole profit of the Ground, and the Owner is wholly excluded, which would be very unreasonable. I shall agree yet further, that upon a Special Case shewn to the Court in the Pleading, the Lord may be excluded from any permanency of profit in his own Soil; as putting this Case, a Lord hath improved so much of his Wastes as that he has left but just sufficient for his Common Feeding; in such Case the Lord ought to be excluded of Feeding; but this must be shewn in Pleading, according to my Lord Coke's Opinion, in Kenwick and Par-giter's Case, which is well reported in Brownl. 2 part, 64, 65. And in all reason there must be Special Pleading in such Case; for where a Prescription or Custom is reasonable only upon Special Matter or Circumstance, that Special Matter or Circumstance must be shewn to the Court, by him that would have the advantage of the Prescription; for the Negative cannot be averred on the other side.

And it cannot be helped, by supposing there may be Trees, Mines or Park; but it ought to be shewn; for every thing that depends upon supposition, may as well not be as be; and to allot a Prescription upon such a Supposal, would be to bind up a Party by it tho' the thing be not; and Pasturage may well be supposed the whole profit of Pasture Ground; for it is so in fact in many places, and has its name, because it is fed all the year. But where it is fed but part of the year, and mowed or plowed the rest, it is called Arable or Meadow.

The main Objection that I conceive they can make to this is, That the Sole Pasturage or Vesture lies in Grant, and the Owner may exclude himself wholly by Grant, and so he may be excluded by Prescription or Custom; and this they ground upon Co. Litt. 4. b. where it is said, If a Man grants to another and his Heirs vesturam terræ, and makes Libery secundum formam Chartæ; yet the Freehold of the Soil shall not pass; by which it is implied that the Vesture shall.

If this Book be to be understood of the Vesture at all times of the year where no other profits remain to the Lord, I shall crave leave to object against him from the same Page, where it is agreed that if it were profits, the Soil would pass.

Yet think it should be the same in reason, where the Vesture is all the profits, and Vesture shall be intended all the profits. I shall cite some Authorities, which are not inconsiderable, to warrant this Opinion.

2 Brownl.  
322.

Dy. 71. a:  
235. b.  
2 Brownl.  
322.  
Owen 37.

1 Inst. 4. b.

Owen 38.

I have in a Manuscript Report of Cases in King James's time, a Case betwixt Collins and the Bishop of Oxford. It was Pasche 19 Jacobi upon a Trial at Bar in the King's Bench. The Case was, that 1 E. 6. the King erected the Bishoprick of Oxford, and gave to the Bishop and his Successors, inter al' primam vesturam of a Meadow called Horse Meadow. John Bridges, Bishop of Oxford, leased it for three Lives, rendering Rent, and dies; his Successors, before restitution of the Temporalities, accepted the Rent of the Lessee and afterwards entered upon him. Upon this Case the first question was, What passed by the Grant of prima vestura?

My Report says, That it was agreed by all the Justices, that by a Grant of Vestura Terræ by a common Person the Soil will pass, and then there must be a Libery of consequence; but they held a Grant of prima vestura was but like a Grant of prima tonsura, and being for no certain time, is but an Interest in the first cutting or taking of the Grass. But they all agreed, that if a Man grants primam Vesturam from such a day to such a day certain, the Grantee shall have the Soil and mow it, or feed it as he pleases.

Kellewey 118. If a Man grants vesturam Terræ for term of Life to another, it is a Grant of the Land for Life; for, saith the Book, the Vesture is the Profit of the Land, and it is all one to have the Profit as to have the Land it self. Littleton puts the Case, if a Man grants the Vesture of Land to another and his Heirs, without Libery, no Estate passeth.

Dy. 375. b.  
Moor 302,  
355.

But the Book where my Lord Coke puts the difference betwixt the Vesture of the Land and the Profits of the Land, seems to be mistaken, and in reason they are the same; for I take it, generally speaking, Vesture shall be intended all the Profits, and if there be special Profits, as Mines opened, or Waters, &c. which may qualify the word, and retain the Soil to the Owner, it must be shewn.

And as it is for Vesture of Land, so I conceive where it appears in Pleading that the Ground is Pasture, Pasturage or Sole Feeding will signifie all the profits; for Pasture is properly that which is wholly for Feeding; and where the Sole Pasture is claimed, the Owner cannot claim, or take any other profit.

Temps E. 1. tit. Partition 21. Two Men agree to make partition of Pasture-Ground in this manner, That one shall have totam pasturam, from such a time to such a time, and the other for the residue of the year; this is a partition of the Soil it self, which shews Pasture is to be intended the whole profits of Pasture-Ground; in that case the quo jure could not be maintained, for the Party had not barely a Libery, but the Soil it self.



If several Men have Profits upon the same Land, *alternis vicibus*, the Law most commonly determines the right of the Soil to be in him that has the most considerable Profits. As for Example,

If one has the Summer Feeding of Pasture, or the first Consume of Meadow, or the Sowing and Reaping of Corn upon arable, and another Man has the Feeding separately at other times of the year; the Law saith, That the Soil is in him that has the Summer profits and Corn, because it is the greater Profits, and the other hath but a Profit a prender.

Cr. Car. 362.  
Hutton 45.

Now suppose that two Men have interchangeably the sole Feeding of Pasture at such times, that the interest of one is in all respects equal to that of the other, there nothing can determine the Soil to be in one more than the other; and therefore it shall be in one for his time, and in the other for his time. But where one has the sole feeding of Pasture at all times in the year, and it has been so time out of mind, and there is nothing but Pasture, what can the other have to shew the Soil to be in him, and why should it not be said to be in him that has the Feeding or whole Profits? It seems very absurd, that a Man should be allowed to be Owner of the Soil, and yet it may be has no badge of Ownership by Perception of Profits, If the Man's Estate be displaced so as to be put to a Writ of Right, how should he lay the Esplees?

And as to this Consideration there may be difference betwixt a Grant and Usage; for a Grant beginning within time of Memory, the Ownership of the Soil was once fully manifested, until he had divested himself of all but that; but upon Usage time out of mind nothing can be said, why one Man should have the Soil more than another, if it be not in him that hath all the Profits.

I must end this Point also with this Observation, That there is no Case in all the Books of a Sole Pasture at all times of the year, but in F. N. tit. Prescription 51 and 55. and Hutton 45. where it is made a Profit a prender, and the most considerable Profits are left to the Owner.

My fourth Reason upon which I hold this Prescription is void, is, because it is a new invention framed to overthrow a Maxim in Law, and is of mischievous consequence.

New Inventions that are agreeable to Rules of Law, I know have been always received, and sometimes have proved of excellent use. But new Inventions that are framed to supplant Principles of Law, have been always baffled and rejected.

The Maxim and Principle of Law that is overturned by this way of Pleading is, That a Commoner cannot prescribe to exclude his Lord.

This

This Maxim is one of the foundations of Law, and depends upon the reason of the thing, and not upon the sound of the word.

It will be objected, that the reason is, because ex vi termini the word Common implies that they are to common with the Lord, which they cannot do if the Lord does not feed.

But I conceive it is not so, for it may be as well called a Common, without a Solecism, where the Tenants feed in common together, and the Lord never feeds with them, as where he does. The true reason is from the nature of the thing, for it is supposed the Lord has no need of his Waste, and to make Non-usage in such a case turn to a Prescription or Custom against him, would be most unreasonable.

Upon the creation of Manors, the Lords took as much as was for their own Use into their Demesns, they distributed as much as was convenient amongst their Tenants; what was left was called the Lord's Waste, which was neglected by the Lord because he had before taken into his Demesns what he had need of.

It were very hard, that Non-usage should turn to a Prescription against the Lord, because he doth not feed his Wastes, when he left them waste before, because he had taken as much before as he had occasion to feed.

It is upon the same reason that the Law will not allow any Prescription for Commoners to exclude, and not upon any Argument from the word Common. Maxims in Law do not depend upon words, but upon foundations of reason; it is not for the honour of the Law that it should have its Maxims depend upon sounds and words, and not upon solid reason.

That Commoners cannot prescribe to exclude their Lords if they call their Right by the term of Common; but if they call it by another name, tho' they claim the same kind of interest, they may exclude them.

If you prescribe to have Communiam excludendo Dom', that is not good; but if you prescribe to have solam & separalem Pastur' in common amongst your selves for Beasts Levant and Couchant, you may exclude him.

Under favour, to have such a Maxim turned out of Doors and made useless, there ought to be very good Authority for it; such an Invention ought to be examined by strict Rules.

And the consequence of this Innovation will be great and general, for there is no Common in England, but this Plea will serve for, if the Jury will find it; and it is found by experience, that many times, though the Lord of the Manor gives very good Evidence, a Jury will find against him; and if a Lord cannot prove an actual feeding, a Jury will certainly incline to find it, let the Court direct what they please.



The King and great Lords that have large Wastes, that lie remote from their care, seldom made any benefit by feeding; and they must not expect hereafter to make any improvements if this pleading be allowed, which will be very mischievous; whereas, if that Maxim of Law were observed, and such an unreasonable Claim disallowed in Pleading, it will not be in the power of Juries to exclude Lords out of their own Wastes.

I conceive, in this Case, upon the matter disclosed in pleading, the Court may discern judicially, that this is but an Innovation, and an Artifice to disguise a Common, and to call it a sole Pasture, to enable the Commoners to prescribe to exclude the Lord, which they cannot directly do by the Rules of Law.

Here first, The Soil is the Lord's of the Manor, and a parcel of the Manor, and a large quantity in truth, 10000 Acres, tho' the place assigned is but 100 Acres.

All the Freeholders and Copyholders of ancient Houses, or parcel of the Manor, are to feed and not to be excluded.

'Tis for Beasts Levant and Couchant, 'tis with an Exception of Hogs, Sheep and Northern Steers, which is like the regulation of Common; if it were a sole Pasture they might have put in what Cattle they pleased, for it is all one to the Lord, who is to be wholly excluded.

The Court may discern by all these Badges, that it is in its nature but a Common, by Art put into other words to oust the Lord.

I shall now crave leave to offer to the view of the Court the Consequences and Inconveniencies of this Prescription.

1. If there be a Surplusage at any time, the Lord cannot improve nor feed, but it must be lost, which is against the Publick Good.

2. If a Stranger feeds and does a Petit Trespass, as it is called in Robert Mary's Case, 9 Co. the Lord can have no Action for the feeding but the Tenants must, and then they must either join or sever; if they join, what a number of Plaintiffs will there be, and how shall the same when recovered be divided, or the Contribution for the Costs? If they sever, and be nonsuit, then there will be as many several Actions which will be vexatious, according to Robert Mary's Case.

3. If a Freehold be purchased by the Lord, or escheat, or a Copyhold Estate be determined, what is become then of the share of the sole Feeding? The Lord cannot join with them in the Prescription; shall he have no benefit of the Soil?

If so, what if all but one fail, shall that one have all?

If, on the contrary, the Lord shall feed, must he do it as the Owner of the Soil, and have the Surplusage? for the Levancy and Couchancy is not material among themselves. And then they would become as Commoners again: and this would be a strange Prescription, that cannot be maintained if ever there were any Escheat of any Tenancy into the Lord's hands.

4. But the greatest mischief of all will be, that this will be a ready way to enable Tenants to withstand all Improvements. In Gateward's Case, 6 Co. 60. it was a great reason against a Prescription, that it was inconsistent with any improvement; it would be a great mischief to this Kingdom where there are large Masses and Commons, Forests and Fens, to take away all power of improving them; for the same Land by improvement becomes able to support a great number of people which are the strength of the Kingdom.

And as there are great inconveniencies on this side, so the other way there will be none at all; for they may enjoy the same Usages as Commoners, if they prescribe the ordinary way, and the Lord cannot do them any prejudice at all; he can only take the Surplusage, leaving them sufficient; if he feeds to their damage, it will be a Surcharge, and an Action upon the Case will lie against him.

The Lord cannot improve but he must leave them sufficient, and there can be no reason why the Owner should not have the Surplusage if any be.

I know they will cite an Authority against me in the Case between Webb and Littleburgh, which was in C.B. 1654. There, I confess, the Declaration was grounded upon a Prescription much like to this, and the Plaintiff had a Verdict, and the Court would not arrest Judgment upon it.

The Answer that I must give to that Case is grounded upon the difference between a Demurrer and a Verdict.

The Court may intend that after a Verdict, which may help it; for I allow an exclusion of the Lord upon a Special Case disclosed in pleading, and that Special Matter may be supplied by the Verdict.

Besides I must observe, that it was a Case of small consequence that concerned the Lord only for his Costs, for he hath enjoyed his feeding against that Verdict ever since: I can say it upon my own knowledge, for I know the Parties, and know the Place, it was at Elnswell near Bury St. Edmunds in Suffolk. The Judges listen to Exceptions after a Verdict, but will give Judgment if there be any possibility to maintain it.

I may add that this was in Popular Times, when all things tended to the licentiousness of the Common People.



I shall conclude praying Judgment against this Prescription for these Reasons:

It is a new and unheard of way of Pleading, and against the Rule of Law, joining Freehold Tenants in the generality, which have no relation one to another, and annexing an entire Interest to several Estates, and mixing Prescription and Custom, which are of contrary Natures, and are great Absurdities.

It is against Reason to oust the Owner of all the feeding, which for ought appears is all the Profits, without any Special Matter or Recompence appearing in Pleading.

There is great inconvenience in admitting of such a Prescription, new Inventions bringing unknown Consequences.

Inconvenience in ousting Tenants of this Prescription, seeing that they claim the same Usage the ordinary way, and the Lord can do them no wrong either by feeding or improvement.

Ch. Just. and  
Tyrrel for  
the Plaintiff,  
Sir H. North,  
Archer and  
Wylde for the  
Defendants,  
Vaugh. Rep.  
258.

In this Case the Court of Common Pleas had been divided in Opinion upon the Matter in Law, as appears by Vaughan's Reports; and therefore Sir Henry North thought not fit to waive the Matter of Law in the King's Bench, altho' he had so good a Case upon the Fact, that if it had been no prejudice, he would join Issue and try the truth of this Prescription at the Bar; whereupon the Demurrer was by consent waived, and the Cause tried at the Bar, and the Verdict passed for Sir Henry North, with the approbation of the whole Court.

Afterwards another Action was brought to trial in the Exchequer at the Bar, and it appearing to the Court that there had been Proposals towards an Agreement, a Juror was withdrawn, and my Lord Chief Baron Hale gave the Tenants advice to comply with this saying, Redime te captum quam queas minimo.

So that the Matter of Law was never adjudged against Sir Henry North, but the matter of Fact tried for him, and the main Question upon the Act of Level never came in question, which may extend to this great Waste, altho' both the other Points were against Sir Henry North.

Afterwards there was another Action brought to trial in the Exchequer, and after a full evidence of about 4 or 5 hours, the Plaintiff not daring to stand the Verdict, was acquitted.

THE

THE  
CASE  
OF  
Sir Robert Atkins,

AGAINST

HOLFORD CLARE,

Under-Sheriff of the County of Gloucester,

TERMINO

Sancti Hillarii, Anno 22 & 23 Car. II.

In Scaccario.

**A**n Action upon the Case was brought by the Plaintiff, setting forth, That he was seised of the Seven Hundreds of Crochon, Bright, Reppesgate, Bradley, &c. in the County of Gloucester, and had Return and Execution of Writs there: That the Defendant knowing of it, did execute several Writs there to the Plaintiff's damage, &c. Upon Not Guilty pleaded Issue is taken, and this Special Verdict is found, (viz.)

They find the Patent of 11 May, 5 Johannis, whereby the King restores to the Abbot and Convent of the Canons Regular, in Cirencester, certain Lands granted to them by his Brother Richard the First; and also grants, That no Sheriff of Gloucester, or his Bailiff, do intromit in aliquo within the Seven Hundreds, except for

Pleas

Vid. Co.  
Entr. 439.  
a Quo War-  
ranto  
brought for  
these Hun-  
dreds.



Pleas of the Crown and Summons, which the Abbot, &c. should receive from the Hands of the Sheriffs, and execute.

They find the Patent of 30 Decembris. 17 E. 3. wherein the King reciting that Richard the first by Patent granted to this Abbot and Convent the Manor of Cirencester and the Seven Hundreds, and the Return of Writs in them, and that thereby they had used and enjoyed Retorna Brevium tanquam pertinentia ad Septem Hundred' prædict'. Reciting also, that he (Edward the Third) for a Fine of 3000 l. grants that they should hold the Manor, Hundreds, Villis, &c. & quod haberent in Villis & Hundredis prædictis, &c. absque impedimento retorna Brevium Infangthes, &c. tanquam pertinent' Hundredis prædictis, &c. of the King and his Successors, &c. and confirms the Patent of King John.

They find, That the Abbot, &c. were seised prout Lex postulat till 4 Febr. 27 H. 8. when the Monastery was dissolved and all came to the Crown.

They find the Statute for besting of these Lands, &c. belonging to the Monastery in the King, and the Statute of 32 H. 8. cap. 20. whereby it is enacted, That all Liberties, &c. which the late Owners of Monasteries had used, &c. shall be revived, and be really and actually in the King, his Heirs, &c. and shall be in the Rule, Order, Surbey and Governance of the Court of Augmentations, and that the same Liberties, &c. shall be used and exercised by such Stewards, Bailiffs, &c. as the King, his Heirs, &c. shall name and appoint, &c. and that the said Stewards, Bailiffs, &c. shall be attendant and obedient to all the King's Courts for all Returns of Writs, &c. as the Officers of the late Owners should have been, &c. and that no Sheriff, Under-Sheriff, &c. should intromit, meddle in, with or upon the other Premises otherwise, or for other cause than they lawfully might have done before the same Premises came to the possession of the King.

They find, That Edward the Sixth (being seised by descent from Henry the Eighth) Anno primo of his Reign, per Lit' Patent' ex gratia & advisamento Concilii sui dedit & concessit cuidam Tho. Seymour Mil', Dom' Seymour de Sudley, omnia illa Hundreda de Crochon, &c. nuper Monasterio Cirencestrensi dudum spectantia, &c. omnia Letas executiones Brevium & retorna eorundem Sect' Hundred', &c. reputat' spectant' & pertinent' Hundredis prædictis, &c.

They find, That the Lord Seymour being seised, &c. was attainted of Treason (by Act of Parliament, 2 & 3 Ed. 6. cap. 11.) and that thereby his Lands and Hereditaments were forfeited and vested in the King.

They

They find, That 6 Octob. Anno 6 Ed. 6. the King grants the Hundred, by his Letters Patents to Kingston, and his heirs, and therein grants omnia amerciamenta Heriota emolumenta hereditamenta, &c. dictis Hundredis quoquo modo spectant' aut ut membrum sive pars eorundum antetunc cognit', reputat', vel usitat', vel habit' aut accept' ut pars parcell' vel membrum. And further grants, by another Clause, Tot talia & tanta & consimilia Jurisdictiones, Privilegia, Libertates, Franchefias, &c. quæ quot qualia & quanta, & adeo plene & integre, as Thomas Lord Seymour, or any Abbot, &c. had, &c. ratione vel prætextu Hundred' prædict' virtute vel colore alicujus Doni, Chartæ, Præscriptionis, &c.

They find, That the Estate which Kingston had, came to the Plaintiff, and that the Defendant entred into the Hundreds where the Liberty is claimed, and executed several Writs, &c. Et si, &c.

Baron Wyndham had argued, and was of Opinion for the Plaintiff; and Baron Littleton for the Defendant.

Now argued Baron Turner and my Lord Chief Baron Hale.

Turner, I am of Opinion for the Defendant. At the last Arguing my Opinion was for the Plaintiff; but upon something which fell from my Brother Littleton I am altered. The Case arises upon the Patents.

I take it to be clear that Return' brevium did not pass by the Patent of King John; there is indeed some implication of such a Franchise; but it is nothing like a Grant of it. 'Tis true, we must put that Exposition upon Ancient Charters, as should have been put in those days wherein they were made: But I say, this Patent would not have been expounded to have amounted to such a Grant in diebus illis. If there had been an Usage of such a Franchise in pursuance of this Patent, (tho' made since Richard the First's time) I think it might have been allowed to have given the Return of Writs, Vid. 2 Inst. 282. But here has been no such Usage.

'Tis true, in the Patent of E. 3. it is recited, That there was an Usage, and that the Franchise was granted by Richard the First, and confirmed by King John; but the Jury's finding of that Patent, is no finding of the things recited in it, as in the 10 Co. 56. b. the finding of Evidence of a Conversion, (scilicet Refusal to deliver on Request) upon a Trover, is no finding of the Conversion.

In 17 Ed. 3. 'tis true, the Hundreds, and the Returns of Writs therein are granted: But since my Brother Littleton's Argument I have been, and am of Opinion, that that Grant is void, and that (as he observed) because of the Statute 2 Ed. 3. cap. 12. Ordaining, That henceforth Hundreds and Wapentakes should not be given nor severed from the Counties: And 14 Ed. 3. cap. 9. Ordaining, That henceforth all the Wapentakes and Hundreds, which were severed from the Counties, should be rejoined to the same Counties,



ties, as before that time had been established by another Statute, (meaning, I suppose, the said Statute of 2 E. 3. cap. 12.) And thereupon my Lord Coke, in the 4 Inst. 267. gives his Opinion, That all the Grants made of the Bailiwicks of Hundreds since this Statute are void, and that the making the Bailiffs thereof belongs to the Sheriff, for the better Execution of Justice and of his Office. And for that he cites a Resolution in his own Case; for he it was that was the Sheriff of Bucks, mentioned in the Case there. Fitzh. Petition 1. 18 E. 3. is a Case of a Man, who by colour of the New Statute 'tis said was ousted of his liberty of Retorna Brevium, which was granted to him and his Heirs by the King in Parliament. My Brother Littleton, cited a good Opinion of three Judges, that an Hundred could not be granted without a Non obstante to the Statute, and here is no Non obstante. Now a Man cannot have the Return of Writs without the Hundred. Vid. 2 Inst. 452. 2 H. 4. pl. 12.

But admitting it did pass, and was granted before the Statute, then the Statute doth not extend to avoid that Grant. But then the Question will be, when the Liberties return to the Crown, Whether the Crown can grant them out again? And therein it will be considerable, Whether they are extinct in the Crown, or no? Kelw. 72. a. I think they are not extinct. In 9 Co. 25. b. 'tis said, that all Liberties, Franchises, &c. which were at first created and erected by the King, and were not Liberties, &c. in the hands of the King as Flowers of the Crown, are not by their Accession to the King drowned in the Crown; and these Hundreds and Leets are instanced in and allowed to be such; And now the Liberty of Retorna Brevium is more strongly such; for that all Jurisdictions (of which Hundreds, &c. are a Branch) were once in the Crown: But Retorna Brevium is but a Ministerial thing. It is expressly adjudged in the King's Bench, Kellewey 72. pl. 16. that the Liberties of Retorna Brevium are not extinct by coming to the King's hands. But however, if they were or were not extinct and drowned, I think that they could not (because of the Statute) be severed and granted to Kingston.

Lord Chief Baron Hale: I am of another Opinion; but I am very glad that two of my Brethren are against me and my other Brother. I would have been glad to have been excused in this Matter.

First, Because the Case relates to my own Country, and is much to the prejudice of it.

Secondly, Because it relates to Retorna Brevium, which I always took to be one of the most pernicious Liberties to the Common Justice of the Kingdom.

Thirdly,

Thirdly, Because it is a Case full of Difficulty; but we that are Judges must satisfy our Judgments, and come to a Resolution, and I must argue as the Law is, and not as I wish it. I argue according to my Conscience, tho' somewhat against my desire, and I am sure against my particular Interest.

I shall be somewhat long, because the Case is very intricate, and requires an Explication of many things.

In the first place I shall explain these Terms in the Case.

First, The Monastery of Cirencester.

Secondly, An Hundred.

Thirdly, Retorna Brevium.

First, As to the Monastery of Cirencester I shall speak a little historically, to shew the tradition and derivation of this Matter. It was a Monastery time out of Mind, but in 30 H. 1. it was translated to the Canons Regular; and therefore Henry the First is accounted the Founder; he endowed it with three hides of Land. Richard the First gave them the Manor of Cirencester, and the Seven Hundreds, at the Farm of 30 l. per annum. The Charter of Exemption (mentioned in the Record) was made by King John, who confirmed the Grant of Richard the First at the same Farm. This you shall find in Charta Antiqua Letter G. (for the Book goes by Letters) Number 9. and the Letter M. in Number 12.

Secondly, The next thing to be considered is an Hundred. Of old time Hundreds were parcel of the Crown, belonging of Common Right to the King. 11 H. 6. 89. Pl. 44. by the Grant of an Hundred there did not pass only a Liberty which had a Court, and also commonly a Leet which is called the Leet of the Hundred; but there was also an implied Power of making a Bailiff: The Bailiff had a double Office.

First, He had the Collection of Perquisites, Amerciaments, Fees; Ancient Duties, as Beowpleader, Head-Silver, &c. belonging to the Hundreds in some places.

Secondly, He had another Office, and that was relating to the Sheriff. In Ancient time the Bailiffs of the Hundreds were the immediate Bailiffs of the King for the Execution of Process. Vide the Statute of Sheriffs made at Lincoln 9 Ed. the second; therein it is said, That the Execution of Writs that come to the Sheriffs shall be done by Hundreds, (i. e. Lords, or rather Bailiffs, of the Hundred) sworn and known in the full County, &c. which is confirmed 2 E. 3. c. 4. and 14 E. 3. c. 9. This thing of farming out Hundreds to persons thus grew to be a great Inconvenience: For as to the Hundreds which were of the County and did belong to the Sheriff, there was no inconvenience; the Sheriff did sometimes account as Custos, sometimes per Mannu. Then those many Provisions were made, viz. 2 E. 3. c. 12. whereas



all the Countieſ in England were in old time aſſeſſed to a certain Farm; and then were all the Hundreds and Wapentakes in the Sheriff's hand rated to this Farm, and afterwards there were Approvers ſent into divers Counties, which did increaſe the Farms of ſome Hundreds and Wapentakes. And afterwards the Kings at divers times have granted to many men part of the ſame Hundreds and Wapentakes for the old Farms only. And now of late the Sheriffs are wholly charged of the Increaſe which amounteth to a great Sum, to the great hurt of the People and diſſerſion of the Sheriffs and their Heirs. It is ordained, that the Hundreds and Wapentakes ſet to Farm by the King that now is, be it for Term of Life or otherwiſe, which were ſometimes annexed to the Farms of the Counties where the Sheriffs be charged, ſhall be abjoined again to the Counties, and that the Sheriffs and their Heirs have Allowance for the Time that is paſt, and that from henceforth ſuch Hundreds and Wapentakes ſhall not be given nor ſeſtered from the Counties. Then 14 E. 3. cap. 4. Whereas many Miſchiefs be happened throughout the Realm, for that Sheriffs have let the Hundreds and Wapentakes to a higher Farm than they do yield to the King, and the Farmers do let the ſame to others at higher and greater Sums, in ſuch manner, that by the letting and enhancing of the Farms, and by the greater number of Bailiffs-Errants, Outriders and others, whom the Sheriffs, Bailiffs and Hundreds do put in, the People be in divers manners charged and grieved: It is aſſented and accorded, That from henceforth all the Wapentakes and Hundreds which be ſeſtered from the Counties, ſhall be reſoined to the ſame Counties, as before this time hath been eſta bliſhed by another Statute, and that the Sheriffs hold the ſame in their own Hands, and put in ſuch Bailiffs and Hundreds, having Lands within the ſaid Bailiwicks and Hundreds, for whom they will answer: And if they will let any Hundreds, Bailiwicks or Wapentakes to Farm, they ſhall let the ſame at the ancient Farm without any thing increaſing, and that the King and his People be ſerved by ſuch Bailiffs and Hundreds, and their Under-Bailiffs, in avoiding for ever the Outriders and others, which in divers Counties before this time have notoriously grieved the People: And that no Bailiff-Errant be but in the County where Bailiffs-Errants have been in times paſt, in the time of the King's Grandfather that now is, and that there be no more but one Bailiff-Errant in one County: And in the ſame manner it is aſſented, That all other, of what Eſtate or Condition they be, which have Bailiwicks or Hundreds in Fee, if they the ſame will hold in their own Hands, then they ſhall put in ſuch Bailiffs for whom they will answer; and if they will let the ſame in Farm to other, they then ſhall let the ſame at the ancient Farm without any thing increaſing, as aforeſaid is ſaid, &c.

For the Sheriffs did farm at a certain Rate, and did account for it in the Exchequer, and this was called Firma Ballivarum.

Hundreds were either parcel of the County, and there the Sheriff did constitute Bailiffs, (viz. these Hundreds which were anciently parcel of the farm of the Sheriffs, that the Statute of 2 Ed. 3. cap. 12. speaks of) or else they were such as were granted out, which the Lord of the Hundred held sometimes at farm and sometimes in fee, called Hundreds of fee, Liberties of Hundreds, Franchises of Hundreds.

It was found that a great Inconvenience grew from the feder- ing of Hundreds from the Counties. The Statute intended that the Sheriff should execute Writs, &c. and it was unreasonable that he should have Bailiffs put upon him, and yet be bound to execute, &c. therefore the Statute intended to reconcile this as far as it could well, and to restore as many of the Hundreds, as could well be, to the Sheriff.

Thirdly, I come to the Third thing to be explained and considered, viz. The liberty of Retorna Brevium.

This is a superadded Liberty, tho' the Hundreds were granted, yet the Sheriff might and must still return the Writs executed there. This Liberty was commonly annexed to the Grants of Hundreds, though sometimes of Manors it is acquirable by Grant, and (I think) by Prescription, though that has been a Doubt: But 8 H. 4. c. 7. pl. 10. speaks of Retorna Brevium by Prescription, and it was adjudged it might be so in the Quo Warranto brought by the Queen against the Earl of Shrewsbury for Retorna Brevium and other liberties claimed by the Earl in Coleharbour in London. You will find the pleading in the New Entries Quo Warranto pl. 2. Mich. 41 & 42 Eliz. in Banco Regis.

Vid. Mo.  
670. contra.

Hardr. 423.

It is true, It was adjudged against the Earl, but it was agreed that a Man might prescribe for Retorna Brevium, and that to have it within a house only; for that place was formerly the Bishop of Durham's Mansion-house.

But the Prescription was naught, because it was applied only to the Return of the Writs of the Queen: For he laid a Prescription (in the Bishop of Durham) to have Retorna omnium Brevium Præceptorum & Mandatorum dictæ Dom' Regina, and says not of her Predecessors; and it is plainly impossible that a Man should have come out of mind the Return of the Queen's Writs when the Queen began her Reign within time of Memory.

This Retorna Brevium carries in it (by Implication) the Execution of Writs, tho' it be not express as in the last preceding Case, where after the Words abovementioned is added, & Executionem eorundem.



And so it was adjudged in the Case of the Countess of Warwick against Atwood, Pasch. 41 Eliz. Rot. 331. B.R.

This liberty, tho' it carries an Exemption, yet it doth not exclude, but that the Sheriff may execute Writs within it. But then it is a Wrong, for which the Lord of the Liberty may have his Action: But in some Cases the Sheriff may lawfully do it, as in the Case of the King, a Non omittas, &c. in case of Execution of a Writ of Waste, whereto he is particularly empower'd by the Statute, and sometimes where the Thing is divided, &c.

But I shall add no more concerning this, but only say,

First, This liberty of Retorna Brevium is a dangerous liberty for him that hath it; for he is to be responsible for all the Defaults of his Bailiffs, as Escapes, &c. And if the Bailiff do not account for the Collection of the King's Revenue, he is responsible for it; 'tis a Feather in his Cap, but a Thorn in his Foot.

Secondly, 'Tis much derogatory to the Justice of the Kingdom: for the Party must go to the Sheriff first, then to the Bailiff, &c. and by this means Justice is delayed and disappointed.

There are two Liberties do abundantly more hurt than they are worth, (viz.) the Grants of Fines, especially of Jurores, and this of Retorna Brevium: Therefore Edward the first, a most Wise Prince, declared in Parliament, and it was recorded in the Courts, That he would not grant it. This you will find in the Pleas of Edward the first, towards the latter End, in Mr. Ryley. The Passage meant is in Placita Parliamentaria 35 Ed. 1. fol. 366. in Mr. Ryley, it is this.

Præceptum Domini Regis,

**L**E Roy ad dit & commande, Quod après cest Grant qu'il ad fait al un Counte de Nicole, de Return de Brief avoir, en deux Hundreds a terme de la vie du dit Counte, le Roy ne voet doner ne granter a nulluy tiel Franchise tant come le Roy vivera, s'il ne soit a ses Enfantès demesne, & ceo voet le Roy que soit escrit en le Chancellerie, en Gardrobe, & al Eschequer.

Thirdly, A Grant of this Liberty was within a certain Precinct, and could not extend to a County, 2 H. 4. For as my Lord Coke observes on W. 2. cap. 39. 2 Inst. 452. A Grant to have Return of Writs in a County is void; for in effect it taketh away the Office of a Sheriff.

By that time I have applied these Observations, I shall in effect have done.

First, It is to be considered, Whether the Charters of King John did create the Return of Writs, or no? seeing there are only

Negative,

Negative, no Positive Words in it. Somewhat may be said to maintain this to be a good Grant of Retorna Brevium, but because the contrary has been admitted, I will admit it too, especially because the scope of the Patent was, that the Abbot should be immediate Officer to the King; and the intention of the Charter was to exclude the Sheriff, and that does appear by the conclusion, where an Exception is made of the Sheriff's Power of meddling per Summonitionem, &c. and so it is like the Case of the Town of Berwick in 5 Jacobi, a Grant to them that they should be a County, but no Grant of having a Sheriff, was adjudged to be void, because there would be no Officer to execute and do Justice. I do observe that 13 Ed. 3. in the Iter there was an Information against this Abbot, and he pleaded the Charter of R. 1. but there is nothing of Retorn of Writs that I can find, and I have read the Book over.

Secondly, We come to consider the Grant of E. 3. I say,

1. It is a good Grant of Retorna Brevium.
2. There is a good annexation of it to the Hundreds by reason of these words, tanquam pertinent Hundredis prædict. for even at this day such a thing as Common of Estovers, &c. may be granted appurtenant. Sacheverell against Porter, 13 Car. 1. 1 Cro. 482. 1 Roll 400. 11 H. 6. 11 Pl. 27. Now then by this Patent here is a Retorna Brevium, not only newly created, but newly created appurtenant, and especially since here is a kind of cognation between the things, this may very well be; in like manner may Cognisance of Pleas be granted; if the King should grant that a Lord of an Hundred should have cognitionem omnium placitorum, &c. tanquam pertinent, Hundred, &c. it would create Cognisance of Pleas appurtenant to the Hundred; for it being a Creature of the King's it may be created as he pleases, either in gross or as appurtenant; for a thing appurtenant may be by Grant, though a thing appendant must be by Prescription.

Well now, this Abbot is seised of this liberty quodammodo appurtenant.

3. When the Monastery, &c. comes to be dissolved and given to the King, it is to be considered, What becomes of this liberty then? I conceive this liberty is in the hands of the King, as it was in the hands of the Abbot, (viz.) as appurtenant, and that without the aid of the Statute of 32 H. 8. c. 20. It was adjudged Kellew. 72. Pl. 16. that this liberty of Retorna Brevium, when it comes to the King, remains in the Crown, and is not extinguished, rejoined or drowned thereby.

And this liberty is not by this coming to the Crown re-annexed to the County, but if that were a Question, the said Statute of 32 H. 8. hath put it out of question, for by that Statute it is in the same state that it was before. 'Tis true, the King might



might rejoin it to the County, but till he does, it continues a liberty distinct, an hundred in gross, and the Sheriff shall write Ballivo Dom' Regis, &c. 'Tis true, if a Man forfeit such a liberty by Nonuser or Misuser, the Sheriff shall enter into it, and do, and execute as in other parts of the County, because in that case the King comes in in Disaffirmance of the liberty, but otherwise it is where the King comes in under a Subject, as in the Bar-case he does.

Fourthly, We come to consider what alteration is made in the Case by the Grant to Seymour and his Attainder: As to this I must observe, that the Verdict is ill found, for 'tis concessit, &c. Dom' Seymour, &c. but not found what Estate, and here is a breaking off in the middle, of which we cannot tell what to make. Now when the King grants, and expresses no Estate, some Books have held the Grant to be void; but the better Opinion is, that it creates an Estate at will, 5 E. 4. 8. (the last leaf) B. pl. 1. but 17 E. 3. 45. Pl. 46. is express in it, and so it was adjudged Pascha 8. Jacobi in Petfall's Case.

Davis 45.

Why then the consequence will be, that by the Attainder the Will was determined, and then the King was in of his Old Reversion, and then the Statute of 32 H. 8. served well to preserve the liberty in the same Estate still. But if the Grant were in Fee, then the King came in by a New Title, viz. the Attainder, and then there is no benefit of the said Statute; so that this Error in the Verdict is most to the disadvantage of the Party (the Defendant) who would not amend it; for there was a Proposal and Discourse of amending, and some things were amended; but the amending of this Mistake would not be consented to by the Defendant. But to suppose this to be a Grant in Fee, I say still it stood of it self a liberty without the Statute, and so when it returned to the Crown by Attainder, it stood not in need of any such Statute, it was Substantive and not melted down in a General Confusion into the Form whence it was derived.

Fifthly, Come we now to the Grant to Kingston: It has many Clauses in it, I will insist upon two.

1. The King grants Omnia Amerciamenta, &c. with large words, Cognita, Reputata, Acceptata, &c. I did say that the Grant of E. 3. made an annexation of this liberty of Rec' Brev. to the Hundreds; and if we should admit that, it were not sufficient to create an appurtenancy in reputation; and if it were no more than so, these words would lay hold on it.

2. The other Clause I will rest upon, thereby the King grants tot, talia & tanta, &c. as any, &c. hab' ratione vel pretextu Hundred' pradiet' virtute, pretextu, vel colore alicujus Doni, Chartæ, &c. Now certainly the latter words are subservient and ancillary

lary, and the ratione vel pretextu Hundredi governs all, for it is but one entire Sentence, like Finche's Case, 6 Co. 39. This pretext is a very large Clause and much more than tot talia & tanta, wherefore I conclude, that it is a good and sufficient Grant of the thing in Question.

Three Objections have been made, to which I shall endeavour to give Answers.

Object. 1. By the coming to the Crown the Liberty is merged.

Ans. 1. It is not.

2. Admit it were merged thereby, yet that is not till the dissolution. Why now in this last Grant there is a Retrospect, and it is with a leaping over to the Seisin which the Abbot had, and therefore the Grant of the King conjoyning it to the possession of the Abbot, the Liberty is effectually revived and erected in the same manner and condition as it was before the uniting of it to the Crown.

Object. 2. If this Liberty be to be revived, yet 'tis not revivable without special Words; in the Grant to Seymour there are the words Retorna Brevium, but in the Grant to Kingston, not.

Ans. Tot talia, &c. does it, and 'tis as much as if all had been particularly recited, because it refers to a thing determinate.

'Tis true, if there were an Act of Resumption, as in Paget and Darcy's Case; or if the thing were merely Personal, as in the Abbot of Waltham's Case, the privilege for his Dogs in the Forest, such general Words will not revive and pass the things, because of the ratio privata which intervenes; but if there be nothing in the Case (which hinders) more than the generality of the words, 'tis clear the words do it; no Case can be fuller than Ameredith's Case is in this point, 9 Co. 29. B. 30. in the Case of Coleharbor above mentioned, the Ret' Brev', &c. came to the Crown by Act of Parliament. The King Ed. 6. grants to Francis Earl of Shrewsbury the House, & quod habeat tot talia, &c. specially reciting many Privileges, Liberties, &c. but not mentioning Retorna Brevium, and concludes, & alia, &c. and it was adjudged that this Grant in these general words did revive Retorna Brev' (for I have a Report of the Case) but only for the Cause above mentioned Judgment was given against the Earl as to the thing.

This Verdict is ill found, the effectual Statute which should aid this Case if there were need is 1 Ed. 6. c. 8. which is not found; thereby it is enacted, That all Letters Patents, &c. made or to be made by the King, of any Honours, &c. Franchises, Liberties, &c. should be good, sure, &c. notwithstanding any misnaming, misrecital or nonrecital of the Premises, or the lack of the true naming of



of the Ratiors, Kinds, Sorts and Qualities of them or any parcel thereof, and notwithstanding piers and sundry other suggestions and surmises, &c.

**Objection 3.** The Patent of Ed. 3. or at least this Patent made to Kingston, is void by reason of the Statute 2 Ed. 3. c. 12. (and likewise 14 E. 3. c. 11) whereby it is ordained, That henceforth the Hundreds and Wapentakes should not be given nor severed from the Counties.

**Ans.** This indeed is the grand Objection, and was materially objected by my Brother Littleton, and the Case of Fortescue against my Lord Coke has been truly cited to this purpose, which was in this Court, and is reported by himself. How shall we do now in this great difficulty? Truly this Objection had need be strictly examined into, for it runs to the avoiding of the Grants of 100 Hundreds and more, which have been granted since 2 Ed. 3.

I do conceive this Grant of Ed. 3. is not within the Statute, for though it be a New Grant of Ret' Brev', yet it is no New Grant of the Hundreds, neither is the Grant of Ed. 6. avoided hereby.

1. This Statute extends only to those Hundreds which were parcel of the Sheriff's Farm, and not to those which were divided, because as to the first only there was an inconvenience to the Sheriff, in that he should be charged with the Farm of the County (the Sheriff's Farm) and yet the profits, the Firma Ballivaria be taken from him. The words of the Statute are, That such Hundreds, viz. as were annexed to the Farms of the Counties, shall not be given nor severed from the Counties, neither did these Hundreds come in to the Sheriff by their coming to the Crown: The Sheriff's Farm was modelled and settled long before; and when these Hundreds came to H. 8. they were not part of the Sheriff's Farm, but he made Bailiffs of his own there, and they were within the Survey of the Court of Augmentations; so I say it refers only to those Hundreds which made a part of the Sheriff's Farm.

2. None of these Statutes extend to prohibit a Grant of an Hundred in Fee. (I apprehend my Lord meant a Regrant of an Hundred, which before those Statutes had been granted out in Fee, for 2 E. 3. c. 12. rejoins and prohibits the Grant of those Hundreds only which were let to Farm by the King for term of Life or otherwise.) The very words of the Statute 14 E. 3. c. 9. make provision for the Hundreds in Fee; 'tis said that they which have Bailiwicks or Hundreds, &c. shall answer for their Bailiffs. Fitzh. Petition 1. there is a complaint of one who is turned out of an Hundred he had in Fee, because of the Statute called there the New Statute: And perhaps these Hundreds were leased, upon the like pretence, and that was the matter of the Presentment mentioned in the Grant of E. 3. or rather Regrant.

T. Jones 194.

3. Neither this Statute nor the Decree or Report of the Case in this Court does extend to this Case; for they are not to be understood of, nor extended to, a Case wherein Retorna Brevium is granted; were not Retorna Brevium added, 'tis true the Grant of the Bailiwick might be void; where an Hundred is granted at this day the Grant is good; but by Virtue of this Statute the Sheriff may put in and use his Bailiffs there, the collection of the Profits, &c. the Grantee shall have, but the execution of Writs is in subordination to the Sheriff, (still I speak where no Retorna Brevium is granted) this Bailiff shall not be a Bailiff to the Sheriff in spite of his teeth; and this was the very Case of Fortescue; he had a Grant of the three Hundreds of Newport: We find the Farm of these Hundreds formerly here in the Exchequer; the Firma Ballivatus in Chiltern, &c. the Farm of the three Hundreds of Newport was 5 l. then in 13 E. 3. 7 l. then in 23 E. 3. 9 l. then in R. 2. 10 l. &c. these were the ancient Farms: Queen Elizabeth grants a Lease of these three Hundreds to Fortescue for three lives at a certain Farm, but does not grant him Retorna Brevium. This Grant indeed was adjudged void, (viz.) as to the excluding of the Sheriff; observe what my Lord Coke saith in the Case, By the Statute, &c. (saith he) Hundreds are rejoined as to the Bailiwick of the same to the Counties; and all Grants made of the Bailiwicks of Hundreds since that Statute are void, and the making of the Bailiffs thereof belongs to the Sheriff for the better execution of Justice and of his Office, and so it was resolved, &c. the Grant at this day is good as to what belongs to the Lord (of an Hundred) but not as to the execution of Process, which belongs to the Sheriff; so that I say,

1. Consider the Grantee as an Officer for the collection of the Profits, &c. and so it is a good Grant.

2. Consider him as an Officer for the King's Process, and so 'tis void, because the Sheriff ought not to have a Bailiff put upon him, and the Grantee shall not be the Sheriff's Bailiff whether the Sheriff will or no. But,

3. I say if the Grant be with Retorna Brevium, then it is a good Grant as to the Bailiwick and all, for in that Case the Sheriff is at no inconvenience, for the Grantee shall do all, and shall be liable to all the Escapes, and all things done or suffered by him.

My Lord Coke was very wary in what he said about this matter, for he knew, and the truth is, if this Statute should make the Grants of Hundreds void, it would call in question most of the Hundreds in England, and particularly would shake his own Grants of Hundreds which he passed when Attorney General, and some of which his Posterity enjoy at this day. 8 H. 7. fol. 1, 2, 3, 4, 5. and 13 H. 7. fol. 19, 20. Pl. 2. is a great Case concerning an Hundred granted by Ed. 4. and afterwards by R. 3. wherein there are many



Questions much argued, whereof the chief is, whether a Leet may be granted and pass as part and parcel of an Hundred? And 'tis adjudged that it may; but it is the Opinion of all on all sides, that the Grant of an Hundred is good, and so much is implied and concluded in the Judgment; Coke upon Ameredith's Case, 9 Co. 29. 30. there Judgment is given that the Grant of the Hundred is good.

I know that in 11 H. 4. by Special Act of Parliament (vid. 1 H. 4. c. 11.) the Sheriffs had an allowance made to them for several Hundreds, which had been parcel of their Farms and were granted away, which could not have been if this Statute had made the Grants void.

I think there ought to be Judgment for the Plaintiff.

Nevertheless I am glad with all my heart, that we are delibered of this Case, for truly if I could have found any Thing to satisfie my Judgment, I would have given Judgment another way, both for the general Concern and for the sake of the County of Gloucester which I know will suffer much by this thing.

One short Act of Parliament of three Lines, (viz.) That all Process should go with a non omittas propter aliquam libertatem (saving still the Liberty of a Man's House, which indeed the Law in all such Cases saves now) would avoid a great delay of Justice, many Suits and Vexations, grievous Wrongs and Oppressions, and would do more good to the Kingdom than all the Liberties of Retorna Brevium have been worth these 100 years; for as they are used now, they are nothing but a foundation of Brocage and Dischief; they are a Feather in his Cap that has them, but they are a Thorn in the Foot of every one that has to do with them: For first the Party must go to the Under-Sheriff, and there he is handled; then through another Purgatory, to the Bassiff of the Liberty, and there he is handled; and then to the Under-bassiff, and there he is handled; and then to the Sheriff again. I confess I drew a short Act once, and I wish some good Man would now promote it.

It is now adjourned into the Exchequer-Chamber.

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CASE  
OF  
COLLINGWOOD and PAGE  
IN THE  
Exchequer Chamber,

The Lord Chief Baron HALE's Argument.

**I**N the Argument of this Case I shall suppose as clear and unquestionable, these three things, viz.

First, That Patrick the Son, and William the Grandson of Nicholas the elder Brother, are not inheritable to John the Earl, because tho' they are both Denizens born, yet Nicholas their Father, through whom they must convey their Pedigree, was an Alien.

Secondly, That as Patrick and William cannot inherit, so neither can they obstruct the Descent to John the Son of George, because being descended from an Alien, the Law takes no notice of them as to this purpose; otherwise 'tis if the said Nicholas had been a Denizen born and attainted, because in such a Case, though he could not take himself by Descent, he could obstruct the Descent to the younger Brother, so the Land would escheat.

Thirdly, That the Case of George, the Son naturalized, and the Case of John his Son, as in reference to John the Earl, and the Descent from him will be all one; if George had survived him, John the Earl might have inherited; so will John his Son, who, jure Representationis, is the same with his Father, et c. converso.

1 Sid. 193.  
Vaugh. 274.  
2 Vent. 1.  
Ch. J. Jones  
10.  
2 Sid. 23, 51,  
148.  
Hardr. 224.  
1 Keb. 65,  
174, &c.  
1 Lev. 59.



These things being unquestionably to be admitted before I come to the Argument of the Case, I shall premise certain General Observations.

First, Touching Descents.

Secondly, Touching the Capacities or Incapacities of an Alien.

Thirdly, Touching Naturalization.

Touching Descents I shall consider,

First, The Rule whereby they are to be governed.

Secondly, The various kinds of Descents or Hereditary Successions.

Concerning the Rule of Descents, we must not govern ourselves therein by the General Notions of Law or Proximity of Nature, but by the Principal Laws of the Country where the Question ariseth; for the various Countries have variously disposed the manner of Descents, even in the same Law or Degree of Proximity.

For Instance.

The Father is certainly as near of Kin to the Son as the Son is to the Father, and is nearer in Proximity than a Brother, and therefore shall be preferred as next of Kin in an Administration. 3 Rep. Ratcliff's Case.

Yet touching the Succession of the Father to the purchase of his Son, the Laws of several Countries variously provide.

First, According to the Jews, for want of Issue of the Son, the Father succeeds excluding the Brother, and that hath been the Use and Construction of the Jewish Doctors, upon Numbers 27. Selden de Successionibus Hebr. Cap. 12.

But the Mother was wholly excluded.

Secondly, According to the Greeks, the Provision for the Succession of the Father is left doubtful. Petit Leges 1, 6. fol. 6.

According to the Romans or Civil Law, by the Construction of the Law of the Twelve Tables, the Father succeeds in the purchase of the Son for want of Issue of the Son under the Title of Proximus Agnatus, and accordingly was their Usage, tho' my Lord Coke supposed the contrary, Co. Lit. 5. But to settle all, the Institutes of Justinian, Lib. 3. Tit. 3. in an Authentick Collection, 8. Tit. de Hæred' ab intestato venientibus, the Son dying without Issue, his Brothers and Sisters, Father and Mother do succeed him in a kind of Coparcenary as well to Lands as Goods.

According to the Customs of Normandy, which in some things have a Cognition with the Laws of England, the Son dying without Issue, his Brothers are preferred before the Father, but the Father is preferred before the Uncles, Terrien lib. 6. c. 6. la Customier de Normandie, cap. Descheants.

3. According to the Law of England, the Son dying without Issue, or Brother or Sister, the Father cannot succeed, but it descends to the Uncle. And it is a Maxim of the English Law, An Inheritance cannot Lineally ascend.

Consequently, the Question being in this Case touching a Descent of Lands in England, it must be ruled and disputed according to the Grounds and Reasons of the Law of England.

Secondly, Touching the Second, the Division of Descents are of two kinds:

First, Lineal, as from the Father or Grandfather to the Son or Grandson.

Secondly, Collateral or Transversal, as from Brother to Brother, Uncle to Nephew, or e converso. And both these are again of two sorts:

First, Immediate, as in Lineals from Father to Son.

Secondly, Mediate, as in Lineals from Grandfather to Grandson, the Father dying in the Life of the Grandfather, when the Father is the medium differens of the Descent.

Thirdly, In Collaterals, from the Uncle to the Nephew, or from the Nephew to the Uncle, where the Father is likewise the medium differens.

And I call this a Mediate Descent, tho' as to many purposes it be Immediate; for the Father dying in the Life of the Grandfather, the Son succeeds in point of Descent of the Lands immediately to the Grandfather; and in a Writ of Entry shall be supposed in the Per to the Grandfather, and not in the Per and Cui.

But I call it a Mediate Descent, because the Father is the medium through or by whom the Son derives his Title to the Grandfather.

Therefore if any Man thinks the term of Mediate Descent not properly used, he may if he please use the words of Mediate or Immediate Ancestors. Words are imposed to signify Things, and therefore the Terms being explained what I mean by them, I shall retain the Terms of Mediate or Immediate Descents.

This distinction of Descents or Relations between Ancestor and Heir, and Hereditary Succession, will be of use throughout this whole Debate.

In Immediate Descents there can be no Impediment, but what arises in the Parties themselves.

For Instance.

The Father seized of Lands, the Impediment that hinders the Descent must be either in the Father or the Son; as if the Father or the Son be Attaint, or an Alien.



Molloy 366,  
to 369.

In Immediate Descents, a Disability of being an Alien or Attainted in that regard I call a *medius Antecessor*, will disable a person to take by Descent, tho' he himself hath no such Disability.

For Instance.

In *Linear Descents*, if the Father be Attainted or an Alien, and hath Issue a *Denizen* born, and dies in the life of the Grandfather, the Grandfather dies intestate, the Son shall not take, but the Land shall escheat.

In *Collateral Descents*:

A. and B. Brothers, A. is an Alien or attainted, and hath Issue C. a *Denizen* born. B. purchased Lands and dies without Issue, C. shall not inherit; for A. (which was the *Medius Antecessor*, or medium differens of this Descent) was incapable. Dyer 74 Gray's Case.

And this is apparent in this very Case; for by this means Patrick, tho' a *Denizen*, and the Son of an Elder Brother, is disabled to inherit the Earl.

A. and B. Brothers, A. is an Alien or person attainted, and hath Issue C. and dies, and C. purchaseth Lands and dies without Issue. B. his Estate shall not inherit for the Reason before going; for A. is a *Medius*, which was disabled. This is *Courtesy's Case*.

And if in our Case Patrick the Son of Nicholas, altho' a *Denizen* born, had purchased Lands and died without Issue, John his Uncle should not have inherited him by reason of the Disability of Nicholas; and yet Nicholas himself, had he not been an Alien, could not immediately have inherited to his Son; but yet he is a Block in the way to John. See the Reason 17 E. 4. cap. 1.

But this must be intended of such as are absolute Impediments, as Attainder or Alien, not Temporary Suspensions: As in the Lord Delaware's Case in 10 Co.

But in any Descents the Impediment of an Ancestor that is not *Medius Antecessor*, between the persons from whom and to whom, will not impede the Descent.

The Grandfather and Grandmother both Aliens, or Attainted of Treason, have Issue the Father a *Denizen*, who hath Issue the Son a *Denizen*; the Son shall be heir to the Father notwithstanding the Disability of the Grandfather: for they are not *Medii antecessores* between the Father and the Son, but *Paranomi*; and yet all the Blood the Father hath, he derives from his disabled Parents.

And this Observation states in effect the Case.

For if the Descent between Brothers be an Immediate Descent, and that the Father be not *Medius Antecessor* between them, then the Disability in Robert will not impede the Descent of George

his Brother, or to John his Brother's Son. But if it be a Mediate Descent, and the Father be a Medius Antecessor between them, then the Disability in Robert the Father may impeach the Descent.

The Second Term to be explained, is that disabling Term of an Alien, and to consider what Disability ariseth from it. The Law, that is the Rule of Descents in England, is also the measure of this Disability, and is the only Rule that must determine how far it extends.

Therefore I consider, what Disability the Law doth induce in case of an Alien.

It doth not hinder, but that an Alien is of the same Degree and Relation of Consanguinity as in the like cases of a Denizen born. The Son, Father and Brother, tho' Aliens, are yet Son, Father and Brother as natural born Subjects, and so taken notice of in our Law.

In Cro. Car. Caroon's Case, he shall be preferred in Administration as next of Kin. Molloy 366, 380.

Secondly, what the Law doth do as to Disabilities of an Alien: And this is of two kinds.

First, The Disability that is Personal or Original to the Alien himself, in reference to Inheritance.

Tho' he may take by Purchase by his own Contract, that which he cannot retain against the King, yet the Law will not enable him by Act of his own, to transfer by Hereditary Descent; the Alien dying, having since a Denizen born, the Land will not descend.

Or to take by an Act in Law; for the Law, *quæ nihil frustra*, will not give an Inheritance or Freehold by Act in Law, for he cannot keep it.

And therefore the Law will not give him, Inheritance by Descent.

Secondly, Courts.

And in respect of this Incapacity he doth resemble a person Attainted; yet with this difference, the Law looks upon a person Attainted as one that it takes notice of: And therefore the eldest Son Attainted, surviving his Father, tho' he shall not take by Descent in respect of his Disability, yet he shall hinder the Descent of the younger Son.

But if the eldest Son be an Alien, the Law takes no notice of him; and therefore as he shall not take by Descent, so he shall not impede the Descent to his younger Brother, 31 E. 3. Cousehage 5. A consequential Consecutive Disability that respects to an Alien from one that must derive by or through him, tho' he perchance be a Natural born Subject.



As in our Case, tho' Patrick, the Son of Nicholas, be a Natural born Subject, yet because Nicholas his Father was an Alien, there is a Consecutive Impediment derived upon Patrick, whereby he is consequentially disabled to inherit John his Uncle; and this Consecutive Disability is parallel to that which we call Corruption of Blood, which is a Consequent of Attainder.

If the Father be attainted, the Blood of the Grandfather is not corrupted, no nor the Blood of his Son, tho' he could not inherit him, but only the Blood of the Father: But that Corruption of Blood in the Father draws a Consequential Impediment upon the Son to inherit the Grandfather; because the Father's Corruption of Blood obstructs the transmission of the hereditary Descent between the Grandfather and the Son.

And here we must take notice of a great diversity between a Disability in the Blood and a Bar.

*Ex. Car. 16. Edwards and Rogers's Case.* William Rogers was seized of a Reversion in Fee, Andrew his Uncle levies a Fine with Proclamations and dies, having Issue John, who dies leaving Issue William; then William Rogers dies without Issue. Rule, that William the Grandson of Andrew shall inherit, notwithstanding the Fine of his Grandfather; and the Reason is, because William Rogers dying after Andrew, the Estate never passed through Andrew, and consequently William the Grandson claiming from William, is in effect a Stranger to the Fine of Andrew, and may aver that Partes, &c.

But in that Case had Andrew been an Alien, or Attaint, then had William his Grandson been disabled to have inherited William by the Consecutive Disability.

Now in the Case at Bar, there is first no doubt but that John the Earl and George were Brothers, tho' they continued Aliens; neither is there any question that they could not have inherited one the other had they continued Aliens; neither is there any question whether that Personal Disability be removed by the Naturalization.

But the Question is, Whether any Consequential or Consecutive Disabilities do result upon them from their Father Robert's being an Alien, which may disable the one Brother to inherit, tho' their Personal Disability be removed? I come to the Explication of the Third Term, (viz.) the Restoring or Enabling Term, Naturalization.

The Means of removing Disabilities of this kind are two:

A temporary, partial and imperfect motion thereof, Letters Patents of Denization, which tho' it puts the Person Denized as to some purposes in the Condition of a Subject, and enables a Transmission hereditary to his Children born after the Denization; yet it doth not wholly remove the Disease or Disability, as to the

point of Descents or hereditary Transmission, and resembles a Pardon in case of an Attainder.

And therefore in Lineal Descents, if there be Grandfather a Natural born Subject, Father Alien, Son Natural; the Father is made Denizen, he shall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grandchild, tho' born after the Denization, both not remove either the Personal, or the Consequential Impediment or Incapacity of the Father.

In Collateral Descents the Father a Natural born Subject hath Issue two Sons Aliens, who are both made Denizens, and one dies without Issue, the other shall not inherit him. This was agreed in Godfrey and Dixon's Case, hereafter cited.

The Second is more deep, (viz.) Naturalization.

According to the Laws of Normandy they may naturalize, but such Naturalization shall not direct a Descent already vested. Tertian, lib. 2. c. 12.

But according to our Law it can only be by Parliament, and not otherwise.

And this cures the defect, and makes them as if they had been Born in England; and no man shall be received against an Act of Parliament to say the contrary; and therefore if the Father an Alien hath Issue a Son born here, and then the Father is naturalized, the Son shall inherit.

If the Father a Natural Subject hath Issue a Son an Alien, who is naturalized; the Father dies, the Son shall inherit, Co. Lit. 129.

Touching the Retrospect of a Naturalization, and whether the Son being an Alien naturalized after the death of the Father, shall direct the Descent to the youngest, depends upon the words of the Naturalization, which being by Act of Parliament, may by a strange Retrospect direct it.

But as the Naturalization in the Case in question is penned, it would not do it, the Naturalization hath only respect to what shall be hereafter.

The Clause of taking by Descent, after the Commencement of the Session of Parliament, is sufficient to check that Retrospect.

And this brings me to the consideration of the Naturalization in the Case in question, and the effect thereof, which I shall not argue as a Point; because I take the Point of the Case to be single: But I shall deliver my Opinion of it by way of Consequence to the Case.

(Read the Naturalization.)

Of the First,



Molloy 374-  
375.

First, In this Naturalization I shall set down, what Effect it hath. And,

Secondly, What Effect it hath not.

First, What Effect it hath: It doth doubtless remove that Inability and Incapacity that is in John the Earl and George, in respect of themselves, being Aliens, and so put them in the Condition as if they had been Born in England.

But if there be a Consequential Impediment or Incapacity described upon them by Robert their Father's being an Alien, which might hinder their Successions one to another, which at the present I suppose, or admit: I say, if there be any such Consequential Impediment, this I take is not removed by this Naturalization.

My Reasons are briefly these:

First, Because this Act of Naturalization hath a proper Subject upon which it may work, and with which it is satisfied, (viz.) the Personal defects of the Parties naturalized, because this Defect arising from the Incapacity of the Father is not in any measure taken notice of by the Act, nor so much as mentioned that the Father was an Alien.

By the whole scope of the Act, and every Clause of it, and those Relative Terms (As if Born in England,) is only to supply the Personal defect of the Parties naturalized, arising from their Birth out of England, and therefore shall never be carried to a Collateral purpose.

Touching the Objection.

Tho' this Remedy will not cure a Disease of another nature, as Illegitimation, half Blood, &c. yet it cures all the defects of Foreign Births, whether in the Parties themselves, or resulting from the Ancestors. And the Act might have been so penned as it might have done it; but it is not.

The Plaster is applied only to defects arising from their own Birth; not defects arising from the Father, or that Consequential disability arising thereby.

Second Objection.

But we find in Curteen's Case, Placita Corone 241. that where the Father was attainted, the Restitution in Blood granted by the Act to the Son, cures that Disability that results from the Father's Attainder; and this not only to the Son, but also to the Collateral Heirs of the Father.

And I have before observed, the Corruption of the Blood by Attainder is only of the Blood of the Father; for the Son's Blood was not at all corrupted. By this Act of Restitution,

1. Notice is taken of the Father's Attainder.

2. It doth intentionally provide against it, and it was the only business of that Act to remove it.

3. Had

had it not removed that Corruption of Blood, it had been useless; for there had been nothing else for it to provide against, and so the Restitution had been idle, had it not had that Effect. But in our Case the Naturalization, as it takes no notice of the defect in the Father, nor provides against it; so it hath another business to satisfy, it doth remedy the Foreign Birth of the Son.

And let us examine the several Clauses in this Act of Naturalization, we shall find the whole scope of it was no other, than to put them in the same and no better Condition, than as if they were Born in England. This is the Governing Clause, both in the first and last Sentence, and an hath influence upon all the Clauses that intervene.

It hath been endeavoured to break the Context, and to make the Clause (As if Born in England) to be cumulative and superabundant.

But this were by a Nicety to alter the scope and intent of the Act.

If it were omitted, yet the first Clause making him but a Natural Born Subject to all intents and purposes, surely makes him no more, and meddles not with the Disability of his Father, or the Consequence thereof.

There hath been some stress laid upon the Clause, which enables him to make his Descent and Pedigree to Ancestors Lineal or Collateral, as if that should entitle George at least to some more advantage by Naturalization, than if he had been born here.

But to this I say,

First, That is a general Clause, and cannot make a Legal Ancestor.

Secondly, Upon the same Reason it may make John or George inheritable to Patrick, and not adjudge the Disability of Nicholas his Father, which no man pretends.

It makes him as much inheritable to Ancestors Lineal, as well as Collateral; and yet it makes no Ancestors Lineal. The Words are General, and create no new Ancestor, that the Law doth not enable.

It is true, that in the Argument of Godfrey and Dixon's Case, especially Montague laid some stress upon these Ancillary Clauses; but the rest rather rested upon the very Matter, that the Party naturalized was thereby become a Natural born Subject.

And thus I have done with the Naturalization, which doth not cure any Disability of Transmission hereditary between the Brothers, resulting from the disability of the Father, if any such be.

But



But it doth cure the personal Disability in John and George, and makes them to all intents as Natural Subjects as if they had been born in England. So that now the Case made is no more than this:

An Alien hath Issue two Sons born in England, and one purchaseth Lands and dies without Issue, whether the other shall inherit?

For, as I have before observed, the Case of John the Son of George is all one with the Case of George himself, whom he represents, as to the Point of the Descent from John the Earl.

Before I come to the Argument of the Question, the Verdict had need be delivered from a Question, which possibly would make an end of the Dispute.

It hath been said, that if the Wife of Robert were an English Woman, there would be no question but the Land might descend between the Brothers John and George, tho' Robert the Father were an Alien; and that it shall be so intended, because nothing appears to the contrary.

To this I say,

It is true, that if the Mother were an English Woman, the Descent from John to George his Son would be unquestionable: For notwithstanding the Incapacity of Robert the Father, by being an Alien, they might inherit their Mother, and consequently they might inherit one the other.

It hath been endeavoured to be answered, That it is not possible the Mother could be an English Woman, because the Sons are found to be Aliens.

Cr. Car. 602.  
March 91.

But that will not be so, altho' an English Man marry an Alien beyond the Seas, and having there Issue, the Issue will be Denizens, as hath been often resolved: Yet it is without question that if an English Woman go beyond the Seas and marry an Alien, and have Issue born beyond the Seas, the Issue are Aliens; for the Wife was sub potestate viri, and yet the Issue born in England should inherit tho' the Husband be an Alien.

Molloy 367.

But the true Answer is, That in this Case Robert the Husband being an Alien, born out of the Allegiance of the Crown of England, and marrying, and having all his Issues born there, he shall not be presumed an English Woman, but shall be presumed a Native in Scotland, where her Husband lived and had Issue, unless the contrary had been expressly found.

Now touching the Point in question, it is true that Sir Edw. Coke in his Little fol. 8. is of another Opinion: He says, That if an Alien have two Sons born in England, and one die without Issue, the other shall not inherit him. But I take the Law to be the contrary.

First,

First, I will shew what Reasons do not move me.

Secondly, What Reasons do convince and satisfy me.

It doth not move me thus to conclude, because there is no defectus Patriæ, or Nationis or Ligeantiæ of either of the Brothers; for tho' there be no personal defect in either of the Extreams, yet it may be possible that a consequential Impediment arising from another Ancestor, may hinder the Descent; and this is apparent in the Case in question, for Patrick the Son of Nicholas the Elder, Brother of John the Earl, hath no Defectus Ligeantiæ, for he was naturalized, yet the Land shall not descend from John the Earl to Patrick by reason of the defect of Nicholas his Father; neither doth it move me that George or John his Son do not claim the Land from Robert the Father, but from John the Earl, for if the Grandfather be seized, the Father is an Alien.

The Son a Denizen born, the Father dies in the Life of the Grandfather, the Son shall not inherit by reason of the defect of the Father, tho' he claim nothing from him, but from the Grandfather.

But the Reasons that satisfy me are these three in order as they are propounded.

My first Reason is, Because the Descent from a Brother to a Brother, tho' it be a Collateral Descent, yet it is an Immediate Descent, and consequently upon what hath been premised at first, unless we can find a Disability or Impediment in them, no Impediment in another Ancestor will hinder the Descent between them.

Now to prove this Descent immediate, I shall use these three ensuing Instances or Evidences.

First, In point of Pleading, one Brother shall derive himself as Heir to another, without mentioning another Ancestor; this hath been at large insisted on by others, and therefore I shall pass it over.

Secondly, According to the computation of Degrees, according to the Laws of England, Brother and Brother make one Degree, and the Brother is distant from his Brother and Sister in the first degree of Consanguinity.

According to the Civil Law, the Brother is in the second Degree from the Brother, for they make one Degree from the Brother to the Father, and from the Father a second Degree to the other Brother; but yet they say in Collaterals, Nullus est proximior Fratre, ideoque in Collateralibus nullus est primus Gradus, sed secundus Gradus obtinet vocem primi, Inst. lib. 3. Tit. B. de Gradibus Consanguinitatis.

According to the Canon Law, Frater & Frater, Soror & Soror, sunt in primo Gradu, Decret' Gratian. Laus 35 quest. 5. ad sedem. And therefore their Laws prohibiting Marriage in the fourth

De-



Degree, take Brother and Sister to be the first Degree of the fourth.

The Laws of England, in computation of the Degrees of Consanguinity, agree with the Common Law, and reckon the Brother and Sister to be the first Degree, and this is apparent by Littleton sect. 20. and the Objection of the Lord Coke thereupon, and the Book of 31 E. 3. Holland's Case cited by Littleton.

And with this likewise agree the Laws and Customs of Normandy, which tho' in some things they differ from the Law of England, as is before observed, yet in this particular and divers other touching Descents, they agree with it. Vid. Glov. Com. super Customeir de Normandy, in Cap. de Escheat, Et doit un scavoir que tonque le Custome de pays de Normandy pur compter les Degrees en Line Collateral solonque les Canonists deux freres ont le premier Degree & eont que un Degree.

By third Evidence that the Descent between Brothers is immediate, thus (viz.) the Descent between Brothers differs from all other Collateral Descents whatsoever, for in other Descents Collateral the half Blood doth inherit, but in a Descent between Brothers, the half Blood doth impede the Descent, which argues that the Descent is immediate.

The Uncle of the part of the Father hath no more of the Blood of the Mother, than the Brother of the Second Gender.

The Brother by the second Gender hath the immediate Blood of the Father, which the Uncle (viz.) the Father's Brother hath not, but only as they meet in the Grandfather.

The Brother of the half Blood is nearer of Blood than the Uncle, and therefore shall be preferred in the Administration.

And so it hath been resolved in 5 E. 6. in Brown's Case, and tho' the Book of 5 E. 6. B. Administration 47. mistakes the Law in preferring the Brother of the half Blood before the Mother, yet it had been right in the case of a Competition between him and the Uncle.

And yet the Uncle is preferred in the Descent before the Brother of the half Blood, and the reason is, because that is a mediate Descent, mediante Patre; but the Descent to the Brother must be immediate if at all, and therefore the half Blood impedes it.

Again, it is apparent, that if in the Line between Brother and Brother the Law took notice of the Father as the Medium thereof, the Brother by the second Gender should rather succeed the other Brother, because he is heir to his Father; therefore in a Descent between Brothers the Law respects only the mediate relation of the Brothers as Brothers, and not in respect of their Father, tho' it is true the Bosom or Foundation of their Consanguinity is in the Father and Mother.

My second principal Reason is to prove, That the disability of the Father doth not at all hinder the Descent between the Brothers immediate, is this,

If the Father in case of a Descent between Brothers, were such an Ancestor as the Law looks upon as the Medium that derives the one Descent from the other, then the Attainder of the Father would hinder the Descent between the Brothers.

But the Attainder of the Father doth not hinder the Descent between the Brothers.

Therefore the Father is not such a Medium or Nexus as is looked upon by Law as the means deriving such Descent between the two Brothers.

Both the former Propositions, and indeed the Illustration and Enforcement of the whole reason, will be evidenced by the comparison of three Cases, the two former of the Cases evincing the truth of the first Proposition, and the latter proving the second Proposition.

The First is Graves's Case 10 Eliz. Dyer 274. The younger Brother hath Issue and is attaint of Treason and dies, the elder Brother having a Title to a Petition of Right, dies without Issue, without a Restitution, the other Brother's Son hath lost that Title, for though that Title were in an Ancestor, that was not attainted, yet his Father that is the Medium whereby he must convey that Title, was attainted, and so the Descent is obstructed.

On the other side, the Case of Courtney, in Cro. Car. 241. Henry Courtney had Issue Edward, and is attaint of Treason and dies, Edward purchaseth Lands, and dies without Issue, the Sisters and Sisters Children of Henry are disabled to inherit Edward, yet neither Edward nor his Aunts were attainted, nor their Blood corrupted, as is before manifested, but only Henry; tho' the Land could not descend immediately from Edward, yet because he, who nevertheless was the Medium whereby the Aunts must derive their Pedigree and Consanguinity to Edward, was attainted, the Descent was obstructed till a restitution in Blood.

But suppose that the Grandfather of Edward was attainted, and not Henry, this could not have hindered the Descent from Edward to his Aunts, because the Attainder had been Paramount that Consanguinity which was between Henry and his Sisters, as Brothers and Sisters, and that is proved by the third Case.

In 40 & 41 Eliz. in the Exchequer, Hobby's Case, William Hobby had Issue Philip and Mary, and is attainted of Treason and dies, Philip purchaseth Lands, and dies without Issue; ruled that notwithstanding the Attainder, Mary shall inherit, because the Descent between Philip and Mary was immediate, and the Law regards not the disability of the Father, and in that Case all the

Reasons



Reasons that have been objected against the Descent in the Case at Bar, were objected.

If it be objected that in that Case the Mother was not attainted, which might preserve the Legal Blood between Philip and Mary;

I Answer, That that would not serve, admitting the Disability of the Parents were not at all considerable; for if it disable the Blood of the Father which is derived to the Son, it would infallibly destroy the Descent to Mary the Sister, for she could not inherit her Brother in the capacity of heir to the part of the Mother, if by the Attainder she had been disabled to take as heir by the Father's Blood, 49 E. 3. 12.

If the heir on the part of the Father be attainted, the Land shall escheat, and shall never descend to the heir of the Mother, because notwithstanding the Attainder, the Law looks upon it as in esse; but otherwise it is in case of an Alien, as hath been before shewn; for if the Son purchase Land and have no kindred on the part of his Father, but an Alien, it shall descend to the heir of the part of the Mother.

And altho' the Blood both of the Father and the Mother were in Mary, yet if she were disabled in the Blood of her Father by his Attainder, she could never intitle her self by the Blood of her Mother.

I have done with this Reason, there remain two Principal Objections to be answered.

Obje<sup>c</sup>t. 1. The Father in the Case at Bar, is the Fountain from whence the Blood of John and George is derived, and their Consanguinity ariseth not from one to another, but from their Father, which is the common vinculum to them both, and therefore this disability in the Parents destroys the Civil Relation of hereditary Blood between the two Brothers.

I Answer First, The very same Objection might be, and indeed was made in Hobby's Case, but prevailed not.

Secondly, But further, no Man will say but that the Blood of the Father and Mother are necessary to derive Consanguinity in the Son, for the Blood of the Father without the Mother is impossible to be derived to the Children; and yet no man will deny, that if the one or the other were Denizen born, their Children should inherit one the other.

Thirdly, But the truth is, the Father and the Mother are the Blood Natural to both the Sons, but it is the Law into which by their Birth or Naturalization they are translated; that is the Fountain of the Civil or hereditary Blood; the Parents are the common Vinculum, the Fountain of their Blood, that aliquod certum in quo conveniunt in regno naturali, but it is the Law of the Land

Land into which by their Birth, or Naturalization they are transplanted, the Commune Vinculum, that aliquod tertium in quo conveniunt in Regno Civili.

Obj. 2. But all their Blood that they have is derived from their Parents, and they can take no other Blood but what they have from them; and if that Blood which the Parents transmit be stained, and void of hereditary Quality, no hereditary Blood can intervene between them.

I Answer, it is true that their natural Blood is derived from their Parents, and as it is that that makes them Brothers Sons, so it is that that makes them their Blood; but yet the civil qualification of their Blood which makes them inheiritable one to the other is from another Fountain (viz.) the Law of the Land; and this Law finding them legitimate & verique conjunctos sanguine parentali naturali, and so natural Brothers, and finding them transplanted into the civil Rights of this Kingdom by their Birth here or Naturalization, which is all one, doth superinduce and close the natural Consanguinity, with a civil hereditary Quality, whereby they may inherit one the other.

For Instance,

A. Grandfather and B. his Wife, both Aliens, have Issue C. a Son born here, who hath Issue D. a Son also born here.

No body can deny that C. hath all his natural Blood from A. and B. and no where else; nor is that Blood that he hath so from them, an inheritable Blood, yet is it unquestionable that D. shall inherit C. and D. hath no natural Blood but what he hath from C. nor C. no natural Blood but what he hath from A. and B. But true it is, the Law doth superinduce that civil hereditary Quality upon the Blood of C. by his Birth in England, tho' as he took it from his Father and Mother it was void of that Quality; the Law of Nature made him indeed Son, but it was the Law of England that gave him a capacity to be an Heir in England, or to have one.

My third and last Reason is indeed more general, tho' not so conclusive as the two former were upon the particular Reason of the Case, tho' not altogether to be neglected. (viz.)

The Law of England which is the only Ground, and must be the only Measure of the Incapacity of an Alien, and of those consequential Results that arise from it, hath been always very gentle in the construction of the Disability, and rather contraining than extending it so severely.

For Instance,

The Statute de hatis ultra Mare 25 E. 3. declares that the Issue born beyond Sea of an English Man upon an English Woman shall be a Denizen, yet the construction hath been, tho' an English

p b b

per.



Merchant marries a Foreigner, and hath Issue by her beyond the Sea, that Issue is a natural born Subject. Molloy 358, 367.  
 Cr. Car. 602. In 16 Cro. Car. in the Dutchy, Bacon's Case, per omnes Justic Angl'.

And accordingly it hath been more than once resolved in my Remembrance, Proun's Case, of Rent.

The Case of the Postnati, commonly called Calvin's Case, the Report is grounded upon this gentle Interpretation of the Law, tho' there were very witty Reasons urged to the contrary; and surely if ever there were reason for a gentle Construction even in the Case in question, it concerns us to be guided by such an Interpretation since the Union of the two Kingdoms, by which many perchance very considerable and Noble Families of a Scottish Extraa may be concerned in the consequence of this Question both in England and Ireland, that enjoy their Inheritances in peace. I spare to mention particulars. So far therefore as the parallel Cases of Attainder warrant this extent of this Ability I shall not dispute, but further then that I dare not extend.

Now as touching the Authorities that favour my Opinion, I shall not mention them, because they have been fully repeated; and the later Authorities in this very Case are not in my Judgment to be neglected.

Cr. Jac. 539.  
 Palm. 13.  
 Godb. 275.  
 2 Rol. Rep.  
 92, 113.

Touching the Case of Godfrey and Dixon, it is true it doth differ from the Case in question, and in that the Father was made a Denizen and then had Issue a younger Son, who inherited the elder Son an Alien born, but naturalized after the Death of his Father; yet there is to be observed in that Case, either the Naturalization of the elder Son relates to his Birth, or relates only to the Time of his Naturalization; whether it did relate, or not, depends upon the words of the Act of Naturalization, which I have not seen.

If it did relate, the Cause in effect will be no more, but an Alien hath Issue a Natural born Son, (for so he is, as I have argued by his Naturalization) and then is made a Denizen, and hath Issue and dies, the elder Son purchaseth Lands and dies without Issue, the younger Son shall inherit; the elder should not have inherited his Father, by reason of the Incapacity of the Father.

But it doth not relate further than the Time of his Naturalization, which was after the time of the Death of his Father, and consequently he could not divest the heirship of his younger Brother; yet if he purchaseth and dies without Issue, his younger Brother shall inherit him, tho' there was never Inheritable Blood between the elder Son and his Father, so much as in fiction or relation.

Upon the whole Case I conclude,

First, That there be two Brothers Natural born in England, the Sons of an Alien, the one shall inherit the other.

Secondly, That the Naturalization puts them in the same Condition as if born here, tho' it does not more.

Thirdly, That John the Son of George stands in the same Condition of inheriting his Uncle, the Earl, as George should have done had he survived the Earl.

Fourthly, But if the Disability of Robert the Father had disabled the Brothers to have inherited one the other, the Naturalization of the Earl or George had not removed that Disability.

Fifthly, But no such Disability of the Father doth disable the Brother George to inherit the Earl; it neither doth consequentially disable John the Son of George to inherit the Earl.

Consequently, as to the Point referred to our Judgment, John the Son of George is inheritable to the Land of John his Uncle.

The End of the First Volume.



Upon the whole Case I conclude,  
 First, That there be two Persons identical both in England,  
 the Son of an Irish, the one being the other.  
 Secondly, That the Administration was made in the same  
 County, and in the same Year, that it was not made.  
 Thirdly, That the Son of George was in the same County  
 when he inherited the Estate, the George being in the  
 same County the same Year.  
 Fourthly, That in the Evidence as the Father had his  
 own Property to give up to one the other, the identical  
 Person of the Son of George had not received that Evidence.  
 Fifthly, That the said Evidence of the Father was made the  
 same Year George to inherit the Estate, it never was made  
 when John the Son of George to inherit the Estate.  
 Consequently, as to the Point referred to one Argument,  
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 Father.



# The End of the First Volume

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A

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